Supreme Court, U.S.
FILED
JUN 17 1996
OFFICE OF THE CLERK

No. 952039

In The

Supreme Court of the United States

October Term, 1995

LEROY LOGAN,

Petitioner,

vs.

BENNINGTON COLLEGE CORPORATION,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether due process requires that a motion to recuse a judge of the United States Court of Appeals based on an allegation of bias be decided or reviewed based on established procedures and by a judge other than the judge who is the subject of the motion?

2. Whether the Second Circuit erred when it held that there was no evidence in the record from which a reasonable juror could have determined that the respondent breached its contract with the petitioner?[1]

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1. Note: Petitioner reserves the right to argue Question 2 in the event certiorari is granted on Question 1, but does not contend that Question 2 alone would merit review of this case by the Supreme Court and therefore does not include Question 2 among the reasons for the grant of certiorari.

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The petitioner, Leroy Logan, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit, entered in the above entitled proceeding on December 14, 1995, and the denial of petitioner's motion for recusal and petition for rehearing and suggestion for rehearing en banc, entered on February 23, 1996, and March 19, 1996, respectively.

OPINIONS BELOW

A jury awarded petitioner $500,000 on his breach of contract claims. Appendix (hereinafter App.) F. After a pre-trial order granting respondent's motion for remittitur, *see* App. F, petitioner consented to a reduced judgment of $202,194.02. App. 46a.

The original opinion of the Second Circuit was issued on December 14, 1995, and has not been reported. *Logan v. Bennington College Corp.*, No. 94-7976L, slip op. 8917 (2d Cir. Dec. 14, 1995). *See* App. G. Petitioner's Motion for Recusal was denied on February 23, 1996, without a written opinion. *See* App. C (Notice of Motion Form). The original opinion was amended by an unpublished order dated March 11, 1996. *See* App. B. Rehearing was denied on March 16, 1996. The amended opinion is reported at *Logan v. Bennington College Corp.*, 72 F.3d 1017 (2d Cir. 1995).

STATEMENT OF JURISDICTION

Petitioner brought this suit in the United States District Court for the District of Vermont. He invoked federal jurisdiction based on diversity of citizenship, 28 U.S.C. § 1332. After a trial, the jury awarded petitioner damages in the amount of $500,000. On a motion for remittitur, the award was reduced to $202,794.02, on September 26, 1994.

On appeal, the Second Circuit on December 14, 1996, entered a judgment and opinion reversing the jury verdict and directing entry of judgment for respondent. Petitioner's motion for recusal was denied on February 23, 1996. A petition for rehearing and suggestion for rehearing en banc was denied on March 16, 1996.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

Fifth Amendment:

> No person shall . . . be deprived of life, liberty, or property, without due process of law. . . .

28 U.S.C. § 455:

> (a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.
>
> (b) He shall also disqualify himself in the following circumstances:
>
> > (1) Where he has personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding. . . .

STATEMENT OF THE CASE

This case presents the extraordinary circumstance of a federal appeals court judge refusing to recuse himself after events occurred which would cause a reasonable person to question the judge's impartiality, where that judge authored a panel decision which overturned a jury verdict which was clearly based upon sufficient evidence and ordered entry of judgment in favor of the respondent.

Petitioner, Professor Leroy Logan, was a member of the faculty in the drama division at Bennington College for 18 years. He received five year presumptive tenure contracts from the College in 1980, 1985 and 1990.

The rights and duties of faculty members at the College are defined in the Faculty Handbook. Although the Handbook was subjected to changes during Logan's tenure at the College, it defined the parties' contractual rights and obligations. The Handbook included, among other things, the definition of presumptive tenure, the procedures for the review and discipline of faculty members, and a sexual harassment policy.

The College's original policy which established a Sexual Harassment Committee, was drafted, approved by the faculty, and incorporated in the Handbook in 1982. The policy did not specifically identify the authority to which recommendations of disciplinary action by the committee were to be sent, although another section of the Handbook required all disciplinary actions regarding faculty members to be brought before the Faculty Personnel Committee.

In September 1989, without the review by the faculty, the College's Board of Trustees announced an Interim Policy on Sexual Harassment. The Interim Policy contained substantial

changes from the previous policy. Among other things, the Interim Policy abolished any role for the Faculty Personnel Committee in disciplinary actions based on allegations of sexual harassment. Any hearing committee recommendation concerning a faculty member would be made directly to the President, who would determine the sanction. Any appeal of her decision to impose sanctions could only be taken to the President.

When the announcement of the Interim Policy on Sexual Harassment was made in the fall of 1989, Professor Logan was conducting a semester abroad program in England. On May 16, 1990, one of the students in that program filed a complaint against Professor Logan with the College. The complaint alleged that Logan had sexually assaulted the student at a party in Cardiff, Wales on Thanksgiving evening, November 1989.

A hearing took place on May 31, 1990. The complainant testified to the events of the evening and the alleged sexual assault. On many points, other students present at the Thanksgiving dinner contradicted the complainant. Professor Logan read a statement to the committee denying the allegations.

After its deliberations, the committee concluded that Professor Logan had sexually assaulted the complainant. It recommended to the President that his employment be terminated.

President Coleman notified Professor Logan on June 12, 1990, that his employment was terminated. He appealed to the President. His appeal was denied on July, 20, 1990.

Professor Logan filed a complaint in United States District Court for the District of Vermont on April 25, 1991, alleging nine counts against Bennington College Corporation and seven

named individuals. Professor Logan sought reinstatement and money damages. In addition to five breach of contract counts, Professor Logan also included claims of violation of federal and state due process clauses, defamation, and negligence in his complaint. On July 16, 1991, the District Court denied his motion for a preliminary injunction for reinstatement. The court dismissed all of the individual defendants and the due process, defamation, and negligence counts by orders of August 6, 1992 and March 19, 1993. At the jury drawing, Professor Logan withdrew his claim for permanent injunctive relief.

In June of 1994, two weeks prior to the trial in this case, and some four years after the firing at issue in this case, Bennington College dismissed some 27 professors, most of whom were tenured. This approximated one third of the entire College faculty. These mass firings were widely reported in the media and were characterized as a battle between the faculty and the administration over control of the College. There exists a gulf of opinion dividing those who support the faculty terminated in the mass firings and those who support the College. *Compare*, Peter Steiner & Dianne Zannoni, "Academic Freedom and Tenure: Bennington College," *Academe*, 91 March-April 1995 (Report of Committee A of the American Association of University Professors) *with*, John Barr & Susan Borden, "Reality Bites Back," *Trusteeship*, 8 January/February 1995.

At trial, Professor Logan pursued four theories supporting his claim of breach of employment contract with the College. First, he claimed that the Interim Sexual Harassment Policy under which he was terminated was adopted in violation of the Faculty Handbook and his contractual rights. Second, he argued there were a number of procedural flaws during his hearing and appeal. Third, he argued that the accusation was untrue, and that the investigation and adjudication of his case was so procedurally flawed and arbitrarily conducted that the decision

to terminate his employment was not based upon good cause. Fourth, Professor Logan claimed that the College breached a contractual duty of "good faith and fair dealing" toward him.

At the close of the evidence, the court ruled that it would not instruct the jury on punitive damages and would restrict any compensatory damages to the five-year contract offered to Professor Logan beginning July 1, 1990. During deliberations, the jury asked if they could return an award of punitive damages. The court instructed them that they could not award such damages.

The jury returned a verdict of $500,000. By order filed August 26, 1994, the trial court denied respondent's post-trial motions for judgment as a matter of law or for new trial, but granted respondent's motion for remittitur, adjusting the damage award to $202,794.02. Petitioner accepted the remitted damages award.

On September 26, 1994, the College filed a notice of appeal. On September 30, 1994, Professor Logan filed a notice of appeal. Briefs were submitted by April, 1995. On the Monday immediately prior to oral argument, as is the practice in the Second Circuit, the three-judge panel made up of the Honorable Judges Frank X. Altimari, J. Edward Lumbard and J. Daniel Mahoney was announced. Oral argument took place in New York City on Thursday, May 18, 1995.

During oral argument, Judge Frank X. Altimari made statements which, when read in light of the text of his opinion (as originally issued), would lead a reasonable person to believe that the Judge's views on the larger faulty/administration struggle at Bennington College influenced his decision in the instant case. Specifically, the Judge offered his opinion that the faculty at the College had "undue influence" at Bennington College:

LOGAN'S COUNSEL: Right. The substantive changes actually are outlined in Section 9.46. Basically the old policy said that this committee which acted independently-the old sexual harassment committee acted independently of the college. That it was unclear about where the references for . . . in fact it was unclear about who had the power to terminate, to fire and to discipline. In fact, Section 9.46 in 1982 said that the faculty had a direct voice in the discipline of other faculty members. That is the core of the change. Bennington College has been traditionally a place in which the faculty has had tremendous impact upon . . .

JUDGE ALTIMARI: Overriding impact!

LOGAN'S COUNSEL: Well, perhaps overriding. Certainly they would say that it's appropriate . . .

JUDGE ALTIMARI: And get very upset and uptight when something is done without their input. And the President doesn't mean anything, the Dean doesn't mean anything - no one means anything in that institution. Other than the members of the faculty who control everything that goes on.

Ultimately, Judge Altimari remarked: "You'll forgive me for knowing more than I should."

On December 14, 1996, the Second Circuit issued its original opinion in Logan's appeal, an opinion written by Judge

Altimari. Judge Altimari began the opinion with a summary of the events concerning the mass firings that occurred two weeks prior to Logan's trial. The opinion cited two articles which make reference to the termination of Logan's employment and describe the mass firings. The articles cited in the opinion contain facts and opinions prejudicial to Logan's position on appeal. One article was written by the wife of a witness who testified for the College at the trial in this case. The other article includes a quotation from one of the jurors in this matter.

The references to the two articles in the opinion, when considered in connection with the comments made by Judge Altimari at the oral argument in this case, would lead a reasonable person to believe that Judge Altimari's views about the proper outcome of this case were influenced by the cited articles or other information gained outside the record.

In reversing the verdict of the jury, the Court of Appeals made the rather unusual finding that as a matter of law there was insufficient evidence for the jury verdict to stand under each of the four different breach of employment contract theories advanced:

First, in finding that under no reasonable view of the evidence could the jury find that the Faculty Handbook had been violated by the College in its adoption of the Interim Sexual Harassment Policy, *see* Joint Appendix submitted to the Second Circuit (J.A.) at 131-137 (Interim Policy), Judge Altimari held that there were no changes of substantial importance between the old and interim policies. There was significant evidence from which a reasonable juror could have concluded otherwise. For example, under the old policy matters of discipline affecting faculty were required to be dealt with in accordance with language providing for a direct role of the faculty. J.A. at 113.

The opinion's conclusion was also inconsistent with the only evidence as to practice under the old policy: the testimony of a faculty member that during the time the old policy was in effect, she had been a member of the Faculty Personnel Committee and it had handled a sexual harassment case. Trial Transcript (T.) I, p. 120. She also testified that it was her understanding that, prior to the implementation of the interim policy, sexual harassment cases would be considered by the Faculty Personnel Committee for appropriate disciplinary action. T. I, p. 121.

Second, Judge Altimari held that there was no evidence that any of petitioner's contractually protected procedural rights were infringed. While the interim policy purported to empower the committee to decide on its own procedures, it also required that the Committee "protect the rights and concerns of both complainant and respondent [and] look at the record as a whole and at the totality of the circumstances. . . . " J.A. at 131. There was evidence tending to show that the Committee refused to consider evidence that the complainant took hallucinogenic drugs at a time proximate to the alleged incident, T. III, p. 19, acted "angry" and "off-beat" immediately prior to the alleged incident, T. III, p. 7, spoke of seeing UFO's and spoke of preferring puppets over people because you "don't have to feed them when you travel with them." T. III, p. 15. While refusing character evidence as to the complainant and evidence of the petitioner's good character, the Committee considered petitioner's "reputation for similar conduct in the past, and his excessive drinking." App. D, at 29a.

Logan also presented evidence that the Committee changed its procedures just before and during the hearing. Professor Logan was not told until the beginning of the hearing that only he or his advocate could ask questions. T.I, p.64. In addition, students who had been told that they could give statements were refused that opportunity at the hearing. T. II, p. 73.

Third, Judge Altimari's opinion holds that there was no evidence from which a reasonable juror could conclude that the College lacked good cause to terminate the petitioner. App. D, at 24a-26a. It holds that petitioner failed to present any evidence of innocence beyond his "conclusory" and "bald assertions of innocence." *Id.* Here the opinion fails to deal with trial testimony of other witnesses that directly contradicted the hearing testimony of the complainant. Another student testified that he was present on the night of the alleged incident and entered the room where the incident allegedly took place at the very time the incident supposedly occurred. He testified that he saw nothing untoward. T. III, p. 72-73. Additional testimony was also presented from other student witnesses who were present on the night of the alleged incident that further contradicted the story of the complainant as to surrounding circumstances. T. III, p. 6; T. III, p. 38.

Fourth, Judge Altimari holds that petitioner's claim based on the implied covenant of good faith and fair dealing amounts to a contention that "the procedure at the hearing should have been different and the fact that it was not evidences the Committee's bias against him." App. D, at 29a. The opinion acknowledges that the covenant "implies that 'neither party shall do anything to injure or destroy the rights of the other party to receive the benefits of the agreement." App. D, at 26a-27a.[2] Then the opinion dismisses eleven different actions taken by the College to undermine petitioner's right to a fair and unbiased hearing stating "the Committee's conduct and the procedures

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2. Citing *Shaw v. E.I. DuPont de Nemours & Co.*, 226 A.2d 903, 906 (Vt. 1966) (the covenant of good faith and fair dealing is broadly interpreted and 'exists to ensure that parties to a contract act with faithfulness to an agreed common purpose and consistency with the justified expectations of the other party'). (citing *Kirke La Salle Co. v. Paul Armstrong Co.*, 188 N.E. 163, 167 (N.Y. 1933)) and *Carmichael v. Adirondack Bottled Gas Corp. of Vermont*, 635 A.2d 1211, 1216 (Vt. 1993)

followed by it . . . did not deprive [petitioner] of any substantive or procedural rights or benefits he had under his employment contract." App. D, at 29a-30a. This, of course, misses the point of the "implied" nature of the covenant: it is a general obligation to preserve the benefit of an agreement.

Respectfully, petitioner submits there was substantial evidence to support not just one, but all four of the breach of theories that he presented to the jury.

On January 27, 1996, Logan filed a petition for rehearing and suggestion for rehearing en banc. On the same date, Logan filed a motion to recuse Judge Altimari from participating in the petition for rehearing. Petitioner contended, and contends, that a reasonable person aware of Judge Altimari's hostile comments at oral argument about the faculty's role at the College, the citations in his opinion to popular press articles describing the mass firings and the faculty/administration struggle at Bennington, and the extraordinary lengths to which Judge Altimari's opinion goes to reverse the jury verdict in favor of petitioner, would conclude that the Judge was aware of the split, sided with the administration in that dispute, and that his view of that conflict influenced his opinion in the instant case.

By order dated March 11, 1996, the Second Circuit amended its original opinion, deleting the references to the power struggle between the faculty and administration at Bennington College, and to the two articles that reported on this struggle. The order stated that: "The [deleted] language contained background, and has no bearing whatsoever on the disposition of the appeal or the key issues raised on appeal concerning the sufficiency of the evidence supporting Leroy Logan's claims."[3]

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3. This ignores the point of petitioner's argument: Because of his (Cont'd)

Petitioner's motion for recusal of Judge Altimari was denied by an unsigned entry order dated February 23, 1996. App. C. The petition for rehearing and suggestion for rehearing en banc was denied on March 16, 1996 after no other Second Circuit Judge called for a vote on the suggestion. App. A.

REASONS FOR GRANTING THE WRIT

I.

THIS COURT SHOULD ESTABLISH GUIDELINES CONCERNING MOTIONS MADE PURSUANT TO 28 U.S.C. § 455 FOR THE RECUSAL OF AN APPELLATE COURT JUDGE AND SHOULD GUARANTEE INDEPENDENT REVIEW OF A FEDERAL APPELLATE COURT JUDGE'S REFUSAL TO RECUSE HIMSELF AFTER AN ALLEGATION OF BIAS.

In order to preserve the integrity of the federal judicial system, this Court should establish guidelines for the independent review of a federal appellate court judge's decision to refuse to recuse himself or herself after an allegation of bias. While a litigant is guaranteed a review of a recusal motion made at the federal district court level, no such review exists when the motion is made at the appellate level. In addition, it is unclear what procedures, if any, are followed when a recusal motion is filed and what Judge or Judges decide a recusal motion directed at an appellate judge. The lack of any independent review and procedure deprives petitioner and similarly situated litigants of their right to due process as guaranteed by the Fifth Amendment to the United States Constitution. In addition, guidelines are

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(Cont'd)
reference to irrelevant material in an opinion which is presumably intended to explain the rationale for his decision, it is reasonable to infer that the author took the irrelevant material into account in making that decision.

necessary to set forth a procedure for recusal motion made pursuant to 28 U.S.C. § 455.

There is a constitutional right to have "a neutral and detached judge" preside over judicial proceedings. *See Ward v. Village of Monroeville,* 409 U.S. 80, 84 (1972); *Aetna Life Insurance Company v. Lavoie,* 475 U.S. 813, 825 (1986) ("The Due Process Clause may sometimes bar trial judges who have no actual bias. . . . But to perform its high function in the best way, justice must satisfy the appearance of justice.") (citations omitted); *Marshall v. Jerrico, Inc.,* 446 U.S. 238, 242 (1980).

In 1974, Congress revised 28 U.S.C. § 455 to provide, in pertinent part, that:

> (a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.
>
> (b) He shall also disqualify himself in the following circumstances:
>
> > (1) Where he has personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding. . . .

28 U.S.C. § 455.

Subsection (a) of the revised statute was a completely new "catch-all" recusal provision, "covering both 'interest or relationship' and 'bias or prejudice' grounds. . . ." *Liteky v. United States,* 510 U.S. __, __, 127 L. Ed. 2d 474, 486, 114 S. Ct.

1147, __ (1994). Importantly, the new provision required "them all to be evaluated on an objective basis, so that what matters is not the reality of bias or prejudice but its appearance. Quite simply and quite universally, recusal was required whenever 'impartiality might reasonably be questioned.' " *Id.* (*citing Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847 (1988)) (emphasis in original). The 1974 revision to 28 U.S.C. § 455 made clear that the "impartiality might reasonable be questioned" standard applied to *all* justices, judges and magistrates in the federal system. *Id.*

The standard for recusal pursuant to 28 U.S.C. § 455(a) is an objective one: whether a 'reasonable man, were he to know all the circumstances, would harbor doubts about the judge's impartiality.' " *Health Services Acquisition Corp. v. Liljeberg*, 796 F.2d 796, 800 (5th Cir.), *aff'd*, 486 U.S. 847 (1988).

At the district court level there is also a specific disqualification statute, 28 U.S.C. § 144. Pursuant to that statute, an allegation of actual bias or prejudice, if legally sufficient and properly supported by the sworn affidavit of a party, requires the district judge to step aside. *See Gallarelli v. United States*, 260 F.2d 259 (1st Cir. 1958), *cert. denied*, 359 U.S. 938 (1959). Of course, a litigant at the district court level may also move pursuant to 28 U.S.C. § 455 for disqualification or recusal of a judge. *See, e.g. Liteky v. United States*, 510 U.S. __, 127 L. Ed. 2d 474, 114 S. Ct. 1147 (1994).

The "goal" of 28 U.S.C. § 455(a) is to " 'exact the appearance of impartiality . . . .' " *In re: Continental Airlines Corp.*, 901 F.2d 1259, 1262 (5th Cir. 1990) (quoting *Hall v. SBA*, 695 F.2d 175, 178 (5th Cir. 1983)).

Regardless of which statute a party proceeds under at the district court level, the party is guaranteed that any refusal by a

judge to disqualify or recuse himself can be reviewed. The action of the trial court may be reviewed by the Court of Appeals on direct appeal of the final order in the case. *See Jaffree v. Wallace*, 837 F.2d 1461 (11th Cir. 1988) (review of denial of recusal motion on direct appeal). Review of a judge's refusal to recuse himself is generally under the abuse of discretion standard. *See United States v. Greenough*, 782 F.2d 1556, 1558 (11th Cir. 1986). It is also possible to seek review prior to a final order through a writ of mandamus.[4]

By contrast, there is no effective review of an appellate court judge's refusal to recuse himself after an allegation of bias or prejudice.[5] In addition, it is entirely unclear what procedure is to be followed when such a motion is made, and what Judge or Judges ultimately decides a recusal motion directed at an appellate judge.

As 28 U.S.C. § 144 does not apply to appellate judges, *see Pilla v. American Bar Ass'n*, 542 F.2d 56, 58 (8th Cir. 1976), a party seeking recusal or disqualification of an appellate judge must invoke 28 U.S.C. § 455. No Circuit Court has enacted local rules specifically addressing filings made pursuant to 28 U.S.C. § 455. *See In re: Bernard*, 31 F.3d 842, 843 (1994) ("Neither section 455, nor the Federal Rules of Appellate Procedure, nor our local rules contain a mechanism for referring disqualification motions to someone else."). Manuals on

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4. The Seventh Circuit requires that a motion made pursuant to 28 U.S.C. § 455(a) alleging appearance of impropriety can only be reviewed by way of a writ of mandamus. *See Taylor v. O'Grady*, 888 F.2d 1189 (7th Cir. 1989).

5. One cannot consider the possibility of review by this Court to be an effective review of motions to recuse court of appeals judges. The Court does not sit to correct erroneous judgments of the inferior federal courts. R. Stern, E. Gressman, and S. Shapiro, *Supreme Court Practice*, § 4.17 (6th Ed. 1986).

appellate federal practice provide little instruction. *See* R. Stern, *Appellate Practice in the United States* (2nd Ed. 1989) (no mention of recusal motions); R. Stern, E. Gressman & S. Shapiro, *Supreme Court Practice* (6th Ed. 1986) (no mention of recusal motions); R. Lynn, *Appellate Litigation* (1985) (no mention of recusal motions); *but see* D. Knibb, *Federal Court of Appeals Manual* § 5.2, at 28-29 (1990 & Supp.) (stating the most "direct" approach is a motion directed at the particular judge, but also suggesting that recusal inquiry by letter is an "appropriate course", as well as a petition for rehearing or motion to vacate the judgment and opinion). Commentators have criticized the federal appellate courts for their lack of recusal procedures and avenues of review. *See, e.g.* J. Stempel, *Rehnquist, Recusal, and Reform*, 53 Brooklyn L. Rev. 589, 637-39 (1987).

This Court has general supervisory power over inferior federal courts. This power is explicitly granted by statute, 18 U.S.C. §§ 3371, 3372 and 28 U.S.C. §§ 2071-2076, and may be exercised either by the promulgation of general rules or by the announcement of a rule of decision in a particular case. *See, e.g., McNabb v. United States,* 318 U.S. 332 (1943) (generally regarded as this Court's first recognition of its supervisory power over lower federal court proceedings); *Zahn v. International Paper Co.,* 414 U.S. 291 (1973) (establishing jurisdictional amount in class action suits).

Upon reviewing Judge Altimari's opinion, petitioner filed a motion for recusal. Petitioner filed his motion with the Second Circuit generally, as opposed to specifically directing the motion to Judge Altimari.[6] In his motion, petitioner requested that Judge Altimari recuse himself from participation in any further

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6. While an affidavit is not required by 28 U.S.C. § 455, the Second Circuit would not accept Logan's motion without an affidavit filed in support of the motion. Petitioner's counsel executed and filed an affidavit in support of the motion.

proceedings in this matter. At the same time, petitioner filed a petition for rehearing and suggestion for rehearing en banc.

The Second Circuit denied Logan's motion for recusal on February 23, 1996. The order denying the motion was signed by a court clerk, indicating that she signed "For the Court." The Second Circuit did not indicate which judge or judges considered and decided the motion.

While petitioner did request that Judge Altimari's failure to recuse himself in this matter be reviewed by way of his petition for rehearing and suggestion for rehearing en banc[7], nothing in the record suggests that any other circuit judge considered it appropriate to consider whether Judge Altimari should be recused. In fact, appellate court judges have declined to consider petitions to disqualify other appellate court judges. *See, e.g. Schurz Communications, Inc. v. FCC*, 982 F.2d 1057, 1059 (7th Cir. 1992) (Posner, J.). Therefore, it cannot be assumed that any independent review of Judge Altimari's refusal to recuse himself has taken place. At present, the law leaves petitioner, and similarly situated litigants, in a situation in which there is no established means by which to seek review of the question whether a court of appeals judge harbors an improper bias, and no legal right to expect that any particular procedure, or any established procedure at all, will be followed by a court of appeals or court of appeals judge in resolving such a question. Indeed, at present such a litigant has no established legal right to expect that any judge, other than the one who is allegedly biased, has authority to act upon such a matter. In this case, petitioner was not even afforded the courtesy of being advised as to who decided the motion he filed.

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7. This method of raising a recusal motion post-decision is suggested in D. Knibb, *Federal Court of Appeals Manual*, § 5.2, at 28-29.

As Justice Frankfurter noted speaking of the Supreme Court in *Baker v. Carr*, 369 U.S. 186, 267 (1962) (Frankfurter, J., dissenting), "[t]he Court's authority — possessed neither of the purse nor the sword — ultimately rests in sustained public confidence in its moral sanction." If that public confidence in the judiciary is to maintained, this Court must exercise its supervisory authority to ensure that serious concerns about the impartiality of appellate court judges are resolved under well defined procedures aimed at protecting the appearance and the reality of a dispassionate judiciary. This is particularly true in a case where an appellate court judge writes an opinion which overturns the verdict of a jury in favor of one litigant and orders entry of judgment in favor of his opponent.

CONCLUSION

As this Court should establish guidelines regarding motions made pursuant to 28 U.S.C. § 455 for the recusal of an appellate court judge and to guarantee independent review of a federal appellate court judge's refusal to recuse himself after an allegation of bias, this petition for certiorari should be granted.

Respectfully submitted,

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June 17, 1996

APPENDIX A — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT FILED MARCH 19, 1996

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
UNITED STATES COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

GEORGE LANGE III
CLERK

At a stated term of the United States Of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 19th day of March one thousand nine hundred and ninety-six.

Dkt. No: 94-7976

Logan

v

Bennington College

A petition for rehearing containing a suggestion that the action be *reheard* in banc having been filed herein by the appellee LEROY LOGAN

Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is **DENIED**.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges for the court in regular active

service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT

GEORGE LANGE III, Clerk

By: s/ Beth J. Meador
Beth J. Meador,
Administrative Attorney

p o ccc
inbancdn_frm

APPENDIX B — ORDER AMENDING OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT FILED MARCH 11, 1996

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 1630, 1761 — August Term, 1994

(Argued: May, 18, 1995 Decided: December 14, 1995)

Amended: MAR 11 1996, 1996

Docket Nos. 94-7976L, 94-9012

LEROY LOGAN,

Plaintiff-Appellee-Cross-Appellant,,

v.

BENNINGTON COLLEGE CORPORATION,

Defendant-Appellant-Cross-Appellee,

TRUSTEES OF BENNINGTON COLLEGE, ELIZABETH COLEMAN, JOAN GOODRICH, RONALD COHEN, DANIEL MICHAELSON, BETSY SHERMAN, ADRIENNE MARCUS, AND LIZ PELLERIN,

Defendants.

Appendix B

ORDER AMENDING OPINION

Before: LUMBARD, ALTIMARI and MAHONEY,
Circuit Judges.

IT IS HEREBY ORDERED that this Court's decision in *Logan v. Bennington Corp.*, No. 94-7976L, slip op. 8917 (2d Cir. Dec. 14, 1995), is amended as follows:

At slip op. 8919, delete the following language appearing at lines 22-32:

> Many of the professors who were dismissed contend that the reason for their dismissal was purely political, and the result of Coleman's attempts to centralize authority and seize as much power as possible. *See* Mark Edmundson, "Bennington Means Business," *New York Times Magazine*, October 23, 1994, at 40; Karen Houppert, "An Education in Deceit: Chasing the Bottom Line Bennington Loses its Soul," *The Village Voice*, September 13, 1994, at 27. Other professors contend that they were fired simply because they sided with Logan in the instant dispute.

The above excerpted language contained background, and has no bearing whatsoever on the disposition of the appeal or the key issues raised on appeal concerning the sufficiency of the evidence supporting Leroy Logan's claims.

SO ORDERED.

Appendix B

s/ J. Edward Lumbard
J. Edward Lumbard, U.S.C.J.

s/ Frank X. Altimari
Frank X. Altimari, U.S.C.J.

s/ J. Daniel Mahoney
J. Daniel Mahoney, U.S.C.J.

APPENDIX C —NOTICE OF MOTION AND ORDER FILED FEBRUARY 23, 1996

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

94-7976L, 94-9012

NOTICE OF MOTION
for *Recusal*

LEROY LOGAN

v.

BENNINGTON COLLEGE CORP.

MOTION BY:

Richard T. Cassidy, Esq.
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OPPOSING COUNSEL:

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Appendix C

Has consent of opposing counsel:

A. been sought? ☒ Yes ☐ No

B. been obtained? ☐ Yes ☒ No

Has service been effected? ☒ Yes ☐ No

Is oral argument desired? ☐ Yes ☒ No
(Substantive motions only)

* * *

Judge or agency whose order is being appealed:

Appeal from United States District Court for the District of Vermont

Brief statement of the relief requested:

Recusal of Judge Altimari from further proceedings in this matter.

By:

s/ Richard T. Cassidy
Richard T. Cassidy

Appendix C

Appearing for: Plaintiff

Leroy Logan

Date
01/27/96

* * *

ORDER

IT IS HEREBY ORDERED that the motion be and it hereby is denied.

FOR THE COURT:
GEORGE LANGE III, Clerk
By: s/ Carolyn Clark Campbell
Carolyn Clark Campbell
Chief Deputy Clerk

2/23/96
Date

APPENDIX D — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DECIDED DECEMBER 14, 1995

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 1630, 1761—August Term, 1994

(Argued: May 18, 1995 Decided: December 14, 1995)

Docket Nos. 94-7976L, 94-9012

LEROY LOGAN,

Plaintiff-Appellee-Cross-Appellant,

—v.—

BENNINGTON COLLEGE CORPORATION,

Defendant-Appellant-Cross-Appellee,

TRUSTEES OF BENNINGTON COLLEGE, ELIZABETH COLEMAN, JOAN GOODRICH, RONALD COHEN, DANIEL MICHAELSON, BETSY SHERMAN, ADRIENNE MARCUS, and LIZ PELLERIN,

Defendants.

Appendix D

Before:

LUMBARD, ALTIMARI, and MAHONEY,
Circuit Judges.

Appeal from a judgment of the United States District Court for the District of Vermont (Billings, *J.*), following a jury verdict, awarding plaintiff-appellee-cross-appellant damages for a breach of contract by defendant-appellant-cross-appellee, which discharged plaintiff for alleged sexual harassment.

Affirmed In Part, Reversed In Part and Remanded.

MITCHELL L. PEARL, Langrock Sperry & Wool, Middlebury, Vermont (Ellen Mercer Fallon, Langrock Sperry & Wool, on the brief), *for defendant-appellant-cross-appellee.*

WILLIAM K. SESSIONS, Sessions Keiner Dumont & Barnes, P.C., Middlebury, Vermont (Bonnie Barnes, Sessions Keiner Dumont & Barnes, P.C., on the brief), *for plaintiff-appellee-cross-appellant.*

Appendix D

ALTIMARI, *Circuit Judge*:

Defendant-appellant-cross-appellee Bennington College ("Bennington" or "College") appeals from a judgment of the United States District Court for the District of Vermont (Billings, *J.*), following a jury verdict, awarding plaintiff-appellee-cross-appellant Leroy Logan ("Logan") damages for breach of contract. We affirm the district court's granting of Bennington's pre-trial motion for summary judgment, thereby dismissing Logan's due process and negligence claims. We reverse, however, the judgment of the district court denying Bennington's post-trial motion for judgment as a matter of law on Logan's breach of contract claims, and remand this case with instructions to vacate the verdict and jury award entered against Bennington.

BACKGROUND

The present case centers on Bennington, a small college located in Vermont which has always prided itself on progressive and non-traditional pedagogy. Recently, Bennington has been criticized by former faculty members and other educators because its President, Elizabeth Coleman ("Coleman"), has undertaken measures to downsize the school. Since 1987, when Coleman took office, nearly one third of the faculty has been dismissed, ostensibly for fiscal reasons. Moreover, Bennington has ended its "presumptive tenure" plan, under which, absent certain circumstances, professors held a five-year term of employment with the College that was automatically renewed for another five-year term. Many

of the professors who were dismissed contend that the reason for their dismissal was purely political, and the result of Coleman's attempts to centralize authority and seize as much power as possible. *See* Mark Edmundson, "Bennington Means Business," *New York Times Magazine*, October 23, 1994, at 40; Karen Houppert, "An Education in Deceit: Chasing the Bottom Line Bennington Loses its Soul," *The Village Voice*, September 13, 1994, at 27. Other professors contend that they were fired simply because they sided with Logan in the instant dispute.

Logan taught drama for eighteen years at Bennington, until his discharge on July 20, 1990, for alleged sexual harassment. At the time the incidents underlying this case occurred, Logan, like other professors at Bennington, had presumptive tenure. As described in section 9.43 of the *Bennington College Faculty Handbook* ("*Faculty Handbook*"), a professor with presumptive tenure held a contract for a five-year term of employment with the College. The College was obligated to extend that contract for another five years, unless the professor substantially failed to perform the terms of his or her employment contract with the College, or exigent financial circumstances or changes in educational policy required elimination of the teaching position.

On May 16, 1990, a male student of Logan's ("complainant") filed a complaint with the College alleging that Logan forced the student to have sexual relations with him on Thanksgiving Day, 1989, in Wales, where Logan was directing a College-sponsored program (the "London Program") in which the complainant was a participant. The student's complaint was referred to the

Appendix D

College's Sexual Harassment Committee pursuant to an interim policy on sexual harassment instituted by Bennington on September 1, 1989 ("interim policy").

The interim policy was designed to replace the College's older policy regarding sexual harassment that had existed since 1982 ("older policy"). Bennington's legal counsel had advised the College that the older policy might not comply with state regulations. Moreover, in an unrelated harassment case against Bennington brought before the Vermont Human Rights Commission ("HRC") by another student, Bennington had signed a conciliation agreement with the HRC which provided that, among other things, Bennington would revise its sexual harassment policy. Accordingly, in 1989 Coleman appointed a six-member committee to draft an interim policy on harassment, which Coleman approved in August, 1989, and the Board of Trustees authorized to take effect as of September 1, 1989.

While the interim policy retains the definition of sexual harassment under the older policy, it is more comprehensive than the older policy with respect to the informal and formal procedures to be followed in cases of complaints alleging sexual harassment. For example, the older policy, contained in Section 1.47 of the *Faculty Handbook* and consisting of three single-spaced pages, established a three-member grievance committee comprised of both genders which was authorized to investigate complaints of sexual harassment and, if the dispute could not be resolved informally, to hold a hearing. Two of the three grievance committee members were appointed by the College President. The only procedures

outlined by the older policy were that (i) notice of the complaint and hearing be given to the parties, (ii) the complainant be allowed to attend the hearing, (iii) minutes of the hearing be kept, and (iv) the result of the hearing could be appealed to the College President. [JA 77-79].

By contrast, the interim policy is seven single-spaced pages [JA 131-137], and establishes more specific procedures at all stages of the grievance process, both informal and formal. Among other things, the new policy creates a five-member Sexual Harassment Committee ("Committee") to investigate and hear formal complaints alleging sexual harassment. The Committee members are appointed by the College President, and include the Director of Student Affairs, who chairs the Committee, two faculty members, one staff member, and one student. According to the interim policy, the Committee's primary function is to conduct hearings for all formal sexual harassment complaints at the College. The Committee can also hear appeals from decisions by the College in informal harassment proceedings. The interim policy authorizes the Committee to establish its own procedures, and to contact all persons who are involved in the case, provided that notice of such contact is given to the parties.

If, after the formal hearing, the Committee concludes that formal disciplinary action against a faculty member is called for, it may recommend to the College President one of several sanctions, including discharge from employment at the College. Appeals from a decision by the Committee may also be taken to the College Presi-

dent within ten days of the decision. The format for such appeals is left to the discretion of the College President. The College President may implement, modify or suspend the sanctions recommended by the Committee, and his or her decision is final. The interim policy further provides that formal complaints of sexual harassment are to be resolved as promptly as possible, and recommends that a written decision be rendered within thirty days of the filing of a complaint.

Logan received notice of the complaint and hearing, as well as a list of seven students who would be interviewed by the Committee as potential witnesses. He acknowledged receipt of the hearing notice, and submitted his own list of twelve witnesses. The Committee notified Logan that only those witnesses with potential direct knowledge of the incidents at issue, namely those in the London Program at the time of the alleged harassment, would be permitted to testify. A five-hour hearing was held on May 31, 1990, at which the complainant, Logan and seven students who had participated in the College's London Program testified. Logan was assisted by a faculty representative. The parties were permitted to question witnesses and read statements, and were examined by the Committee members.

The Committee deliberated for several days, and in a written report and recommendation unanimously recommended termination of Logan. [JA 139-42]. The Committee members found the complainant's testimony detailed and credible, and Logan's testimony vague and uncorroborated by several of the witnesses. The Committee's recommendation was sent to Coleman. Logan

appealed the decision to Coleman, who held a hearing on the matter in which Logan was represented by counsel. At the hearing's conclusion, Coleman declined to alter the original decision, and Logan was terminated.

On April 25, 1991, Logan commenced the instant action against the College and the individual faculty and staff members who were involved in the decision to terminate him. Seeking reinstatement and damages, Logan's complaint alleged claims for breach of contract, negligence, denial of federal and state due process, and defamation. Prior to trial, Logan stipulated to the dismissal of the defamation claim. Except for the breach of contract claims against the College, the remaining claims were dismissed by the district court's grant of summary judgment in favor of Bennington. The breach of contract claims against the College proceeded to trial.

At trial, Logan contended that when he was hired, he was told that the terms of his employment contract were set forth in the *Faculty Handbook*. He proceeded to present four separate breach of contract theories to the jury. First, Logan contended that Bennington adopted the interim policy in violation of his contractual rights contained in the *Faculty Handbook*. Second, he contended that Bennington failed to afford him the procedural rights guaranteed under his employment contract. Third, Logan claimed that Bennington lacked good cause to terminate him because the charges against him were untrue. Fourth, Logan claimed that by terminating him, Bennington breached an implied contractual duty of good faith and fair dealing. After a four-day trial, the jury rendered a verdict in favor of Logan in the amount of

$500,000. The district court reduced the amount to approximately $200,000, on the ground that the jury disregarded the Court's instruction that punitive damages were not available to Logan as a remedy. The district court also denied Bennington's motions for judgment as a matter of law and for a new trial.

Bennington now appeals from the district court's denial of it motion for judgment as a matter of law. Logan cross appeals from the district court's order granting summary judgment in favor of Bennington and dismissing his claims based on negligence and due process, as well as the district court's ruling disallowing the jury's punitive damages award.

DISCUSSION

I. BENNINGTON'S APPEAL

As noted above, the only claim considered by the jury was Logan's allegation of breach of his employment contract. It is unclear from the record, however, which of the four theories presented by Logan as the bases for his breach of contract claims were relied upon by the jury in reaching its verdict. Thus, in order to prevail on this appeal, Bennington must demonstrate that there was no legally sufficient evidentiary basis for a reasonable jury to have found in Logan's favor with respect to any of the four theories underlying his breach of contract claims. *See* Fed. R. Civ. P. 50(b).

As we have previously explained, judgment as a matter of law is appropriate when there is "such a complete

absence of evidence supporting the verdict that the jury's findings could only have been the result of sheer surmise and conjecture, or [where there is] such an overwhelming amount of evidence in favor of the movant that reasonable and fair minded [persons] could not arrive at a verdict against [the movant]." *See Concerned Area Residents For The Env't v. Southview Farm*, 34 F.3d 114, 117 (2d Cir. 1994) (internal quotations and citations omitted), *cert. denied*, 115 S. Ct. 1793 (1995). The Court views the evidence in the light most favorable to Logan, and gives Logan the benefit of all reasonable inferences from the evidence that the jury might have drawn in his favor. *See id.* In considering the evidence, the Court may not weigh evidence, assess credibility, or substitute its opinion of the facts for that of the jury. *See Weldy v. Piedmont Airlines, Inc.*, 985 F.2d 57, 59 (2d Cir. 1993).

Preliminarily, the issue of whether the *Faculty Handbook* contains the contract of employment between Bennington and Logan must be briefly addressed. Under Vermont law, disputes concerning the agreed-upon terms and conditions of an employment contract are an issue of fact for the jury to decide. *See Sherman v. Rutland Hosp., Inc.*, 500 A.2d 230, 231-32 (Vt. 1985). Bennington does not dispute this as a general rule, but contends that, because the *Faculty Handbook* contains much extraneous information, such as library policy and the available meal plans, it cannot be regarded as a contract. The *Faculty Handbook*, however, addresses many matters that would typically be included in an employment contract. Indeed, section 9—which contains, among other things, the provisions regarding presumptive

tenure—is entitled "Conditions of Employment." The jury, therefore, could reasonably have interpreted the relevant portions of the *Faculty Handbook* as constituting the contract of employment between Logan and the College, and containing the rights and obligations of the parties.

1. Approval of the Interim Policy.

Logan first contended that the adoption of the interim policy constituted a breach of contract, because it was not approved by the faculty as required by the *Faculty Handbook*.

Section 9.46 of the *Faculty Handbook* provides that in matters relating to personnel policies, including contract terms and discipline, decisions are to be made by a process of mutual consultation between the College President, the Faculty Personnel Committee ("FPC"), the faculty, and the College Board of Trustees. The section further provides that "[n]o changes of policy of substantial importance" may be undertaken "except upon the recommendation of the full faculty after a report from the President and the FPC," and "[n]o substantive administrative decision affecting [the] faculty" can be made except after consultation with the FPC. According to Logan, adopting the interim policy required consultation with the entire faculty because it effected a "substantial change" from the older harassment policy contained in section 1.47 of the *Faculty Handbook*, by transferring control over the disciplinary process from the faculty to the administration.

The interim policy was not presented to the faculty or the FPC prior to its implementation; rather, it was approved by Coleman and the Board of Trustees. In a letter dated September 1, 1989, President Coleman notified faculty, students, and administrative personnel that the interim policy would replace the older policy printed in the various college handbooks, including the *Faculty Handbook*, and that the interim policy would be in place for the 1989-1990 academic year. Despite the lack of faculty consultation, nothing in the College's process of formulating, adopting, and implementing the interim policy supports Logan's contention that Bennington's adoption of the interim policy constitutes a breach of contract under the *Faculty Handbook*.

First, the substantive and procedural standards governing harassment cases in the interim policy are nearly identical to those contained in the older policy. For example, the definition of harassment in the two policies is identical. Each policy also requires the investigation of a formal complaint of harassment by a specially constituted committee, and prescribes both notice to the person charged with harassment, and a hearing on the matter. Both policies further provide for an appeal of the committee's decision to the College President. Significantly, other than requiring an investigation into the charges, notice of the charges to the accused, a hearing on the matter, and an appeal to the College President, the two policies are silent as to what procedures were to be utilized by the committees authorized to handle the matter.

Second, the older and interim policies provide for dis-

ciplinary and appellate proceedings in the case of sexual harassment allegations which are distinct from the disciplinary and appellate proceedings governing termination of presumptive tenure. Contrary to Logan's contentions, under the older policy neither the faculty nor the FPC had a role in disciplining persons charged with sexual harassment. Section 1.47 of the older policy provided for resolution of harassment claims by a three-member grievance committee, two of whom were appointed by the College President. Their decision could be appealed to the College President. No provision was made in the older policy for review of the grievance committee's decision by the FPC or any other faculty representative. The interim policy provides that all formal harassment complaints shall be handled by the five-member Sexual Harassment Committee, whose members are appointed by the College President. The Committee's decision can be appealed to the President. Like the older policy, the interim policy does not provide for the involvement of the faculty or FPC in disciplining members accused of harassment.

Thus, the interim policy did not change the College's harassment policy in any substantial way, such that the faculty-wide and FPC consultation and approval under the provisions of section 9.46 of the *Faculty Handbook* would be required prior to the policy's adoption. Rather, the interim policy created additional informal procedures in harassment cases, and amplified what procedures could be followed by the Sexual Harassment Committee in formal complaints, while retaining that Committee's discretion to "decide on its own procedures." [JA 136].

Indeed, had Logan's case arisen under the older policy, it is clear that the proceedings would not have differed in any significant respect.

Finally, assuming for the moment that Coleman's failure to present the interim policy to the faculty for approval constituted a breach of the employment contract, Logan would be entitled to nothing more than nominal damages for that breach. Any monetary damages incurred by Logan in this case could not have been caused by the alleged breach, because the provisions contained in the two policies governing harassment cases are substantively the same. Rather, Logan's monetary damages, if any, resulted from his termination. The College's alleged failure to acquire faculty approval for the interim policy affected all the faculty members in an equal manner, and as a result Logan can only be entitled to—as would other faculty members—nominal damages. *See, e.g., Weeks v. Local 1199, Drug, Hosp. and Health Care Employees Union*, 892 F. Supp. 568, 574 (S.D.N.Y. 1995) (where breach of union contract does not cause economic loss, injured party entitled to nominal damages); *cf. Dannhausen v. Business Publications Audit of Circulation, Inc.*, 797 F.2d 548, 552 (7th Cir. 1986) (association's by-laws are in the nature of a contract between the association and its members, and a breach of the by-laws entitles the association's members to nominal damages).

Accordingly, the adoption of the interim policy without faculty approval cannot serve as the basis for the jury's verdict and award to Logan. There is insufficient evidence in the record for a reasonable jury to find that

Bennington adopted the interim policy in violation of any of the procedures outlined in the *Faculty Handbook*.

2. Procedural Rights Under the Contract.

Logan alleges that a variety of "procedural flaws" occurred during his hearing and appeal, such as his not being able to speak with witnesses prior to the hearing, and the Committee's consideration of his drinking problems during its deliberations. According to Logan, these alleged flaws, which are delineated and discussed more fully below in the section dealing with Bennington's alleged breach of the duty of good faith and fair dealing, violated his procedural rights under his employment contract with Bennington.

Logan's contentions are without merit. None of the alleged flaws he cites contravene a specific provision found in the interim policy or elsewhere in the *Faculty Handbook*. Rather, these alleged flaws concern procedures that Logan believes should have been afforded him. Except for the required notice of charges against the accused and holding a hearing, however, neither the older policy nor the interim policy specifies any particular procedural requirements that the grievance committee or the Sexual Harassment Committee must follow. The interim policy authorized the Sexual Harassment Committee to formulate its own procedures. As a result, because Logan can point to no provision in his employment contract regarding "procedural rights" that Bennington breached, his claim that Bennington breached the employment contract as a result of "procedural flaws" in his disciplinary hearing and appeal is insufficient to support the jury's verdict.

3. Good Cause

Logan's third theory of breach of contract was that Bennington lacked good cause to terminate him, as required by the terms of the presumptive tenure provision. To show Bennington's alleged lack of good cause, Logan asserted at the trial that he was actually innocent of the charges and offered evidence which allegedly demonstrated that his hearing was procedurally "flawed." On appeal, Logan asserts that he should receive a trial *de novo* in the district court on the question of his guilt. He contends that if the jury believed that he was innocent, it could conclude that Bennington did not have sufficient cause to fire him. Bennington, on the other hand, argues that Logan's innocence is not determinative of the breach of contract action. Moreover, it contends that Logan was only entitled to the procedural protections contained in his employment contract, and that he cannot claim lack of good cause based on what he believes would have been better procedures.

Initially, we note that neither the presumptive tenure provisions of the *Faculty Handbook* nor the interim policy mention "cause" for terminating a faculty member. Rather, the presumptive tenure provisions state that a five-year presumptive tenure contract will not be automatically renewed if the professor substantially fails to perform the terms of his or her employment contract with the College, or exigent financial circumstances or changes in educational policy require elimination of the teaching position. The interim policy provides that termination of the accused is one option the Committee may recommend after it makes a determination that the

charges of sexual harassment are substantiated. Clearly, these provisions can be considered as two independent grounds of "cause" for terminating a faculty member.

We agree with Bennington that the primary issue under this theory of breach of contract presented by Logan is not his guilt or innocence with respect to the harassment charges. Rather, the primary issues are (1) whether Logan presented any evidence that Bennington discharged him without cause, or (2) whether he received fewer procedural protections than he was entitled to receive under his employment contract. With regard to the first issue, Logan failed to present any evidence at trial establishing that he was discharged without cause. Instead, he merely asserted his innocence in a conclusory manner. His bald assertions of innocence are insufficient as evidence that he was discharged without cause. Given that the College had the authority under the relevant provisions of the *Faculty Handbook* and interim policy to terminate a faculty member, Logan's claim that he was discharged without "good cause" in the face of his failure to present any evidence to the contrary is unavailing.

With respect to the second issue, Logan's attempt to demonstrate that there was no good cause to fire him because the hearing procedures were "fatally flawed" and a "sham" is equally unavailing. As discussed above, there is no merit to Logan's contention that the hearing and appeal were procedurally flawed. Logan's employment contract did not afford him the right to have all disciplinary proceedings conducted in any manner he wished, or resolved in his favor. Under the older and

interim policies, Logan was entitled to a hearing, notice of the charges against him, and a right to appeal to the College president, all of which he received. Logan's assertion that the hearing was a "sham" is nothing more than a restatement of his contention that the proceedings were procedurally flawed. This assertion is considered below, in our discussion of Logan's claim that Bennington breached its duty of good faith and fair dealing.

We conclude that Logan put forth no evidence that Bennington discharged him without cause. Accordingly, the jury's verdict and award to him could not be based on the theory that Bennington breached its contract by discharging him without good cause.

4. Breach of Duty of Good Faith and Fair Dealing

The final argument Logan relies upon to support his claim for breach of contract is that Bennington breached its obligation of good faith and fair dealing by conducting a "sham" hearing.

"Under Vermont law, an 'implied covenant of good faith and fair dealing prevails in every contract.' " *McHugh v. University of Vermont*, 758 F. Supp. 945, 953 (D.Vt. 1991) (citation omitted), *aff'd*, 966 F.2d 67 (2d Cir. 1992). The duty implies that "neither party shall do anything to injure or destroy the rights of the other party to receive the benefits of the agreement." *Shaw v. E.I. DuPont de Nemours & Co.*, 226 A.2d 903, 906 (Vt. 1966) (citing *Kirke La Shelle Co. v. Paul Armstrong Co.*, 188 N.E. 163, 167 (N.Y. 1933)); *see also Carmichael v. Adirondack Bottled Gas Corp. of Vermont*, 635 A.2d 1211, 1216 (Vt. 1993) (the covenant of good faith and

fair dealing is broadly interpreted, and "exists to ensure that parties to a contract act with 'faithfulness to an agreed common purpose and consistency with the justified expectations of the other party.' ") (citation omitted). The burden of showing breach of the covenant is on the plaintiff. *See Lambert v. Equinox House, Inc.*, 227 A.2d 403, 404-05 (Vt. 1967); *Burke v. N.P. Clough, Inc.*, 78 A.2d 483, 485-86 (Vt. 1951).

At trial, Logan alleged a variety of errors in the hearing that, even if they did not constitute a violation of an express contractual provision, taken together allegedly demonstrated that his hearing was not conducted in good faith and thus, as he describes it, rendered the hearing a "sham." Specifically, Logan alleged that: (1) the Committee chairperson acted as both investigator and judge because she questioned witnesses prior to the hearing; (2) the chairperson met with the complainant prior to the hearing, and did not disclose this fact to Logan; (3) although Logan was told who the witnesses would be at the hearing, he was forbidden from speaking with them prior to the hearing; (4) the chairperson allegedly sought to uncover evidence of Logan's past behavior (earlier incidents of harassment and excessive drinking) prior to the hearing; (5) Logan was not allowed to present favorable character evidence, nor was he allowed to present evidence impeaching the credibility of the complainant; (6) several Committee members were biased against Logan (one professor had the complainant as a student, and another professor allegedly thought Logan was an "overweight drunk"); (7) the Committee members allegedly discussed Logan's problems with alcohol dur-

ing their deliberations; (8) because he was instructed not to speak to witnesses before the hearing, Logan lost the opportunity to speak to Peter Dinklage, who was with Logan and the complainant on the night of the alleged harassment, and who would have allegedly corroborated Logan's account of the incident underlying the charges; (9) Logan was told only immediately prior to the hearing that only he and his advocate could examine the witnesses, and that witnesses could not issue prepared statements; (10) no recording was made of the hearing; and (11) Coleman both suggested the appropriate punishment and heard Logan's appeal. Logan argues that taking these errors together, a jury could conclude that Bennington "breached its obligation of good faith and fair dealing with Professor Logan when it subjected him to such a mockery of reasoned evaluation of the evidence against him."

These "errors" that Logan cites do not support his claim for breach of the duty of good faith and fair dealing, as a matter of law. First, even under the older policy, committee members took active roles in all phases of the hearing. Logan's argument implies that in the private employment context, investigation and decision-making with respect to discipline must always be performed by different persons. However, there is no basis for such a rule. Second, except for the Committee members, neither Logan nor anyone else was permitted to question witnesses prior to the hearing, and Logan was free to examine the witness at the hearing. Third, Logan does not suggest why he could not elicit the alleged favorable information from Peter Dinklage upon

questioning him at the hearing, rather than talking to him prior to the hearing. Fourth, no character evidence of any kind was permitted during the hearing with respect to Logan or the complainant.

We acknowledge that some of the Committee members were aware of and considered Logan's reputation for engaging in similar conduct in the past, and his excessive drinking. But their considerations do not rise to a level of bad faith, and beyond mere assertion and speculation, Logan has not shown how the Committee's consideration of his past behavior and drinking constitutes a breach of the duty of good faith and fair dealing. Similarly, his allegation that two members of the Committee were biased against him also rests on speculation. Logan does not suggest why the fact that one professor on the Committee who had the complainant in her class indicates bias on that professor's part. As to the other professor alleged to be biased because he considered Logan an "overweight drunk," Logan fails to mention that he consented to this professor's presence on the Committee.

In essence, Logan's contention is that the procedure at the hearing should have been different, and the fact that it was not evidences that Committee's bias against him. None of his allegations of bias, however, rise to the level necessary for finding a breach of the duty of good faith and fair dealing. Moreover, even accounting for all reasonable inferences in Logan's favor, nothing in the record supports the conclusion that there was sufficient evidence that would allow a reasonable jury to find for Logan on the claim that Bennington breached its duty of good faith and fair dealing. The Committee's conduct

and the procedures followed by it during the course of Logan's hearing and appeal did not deprive Logan of any substantive or procedural rights or benefits he had under his employment contract.

5. Summary.

None of the four grounds raised by Logan to support his breach of contract claim justifies the jury's verdict. As a result, the district court erred in denying Bennington's motion for a judgment as a matter of law and its decision must, therefore, be reversed and the matter remanded to permit vacatur of the verdict and award.

Because we conclude that the district court erred in entering judgment for Logan on his breach of contract claim, we need not address Bennington's alternative arguments in support of reversal. We therefore move on to consideration of Logan's cross appeal, although we need not resolve Logan's claim that the district court erred in failing to instruct the jury that it could award punitive damages based on Bennington's breach of contract. We consider only that portion of Logan's cross appeal which challenges the refusal of the district court to submit certain theories of liability to the jury.

II. LOGAN'S CROSS-APPEAL

1. Due Process.

Logan contends that the district court erred in granting summary judgment on his due process claims. He alleges that both his federal and state due process rights were violated by Bennington's conduct.

Appendix D

Although Bennington is a private university, Logan contended before the district court that the Vermont HRC's involvement in the conciliation agreement, which required that Bennington change its harassment policy, constituted enough involvement by the state to render Bennington's conduct "state action" for purposes of a due process challenge. The district court rejected this argument after affording Logan ample time for discovery. In an unpublished order granting summary judgment in favor of Bennington on the due process claims, the district court held:

> There is no evidence that the Commission [HRC] had any involvement in preparing, drafting, or revising the College's sexual harassment policy. Nor did it take any part in the proceedings against plaintiff. The Commission's involvement with the College's sexual harassment policy was one of urging the College to revise a pre-existing policy, the Commission having been involved in the settlement of a separate and distinct discrimination complaint between the College and one of its students. Consequently, there is no state action, compulsion or conduct.

[Appendix for Appellee at 2].

Logan contends on appeal that there was enough ambiguity surrounding the state's role to preclude summary judgment on this issue. Moreover, he contends that the district court abused its discretion in quashing his subpoena to depose the executive director of the HRC. Logan's contentions are without merit.

Appendix D

With regard to his claim concerning the subpoena to depose the executive director of the HRC, we review the district court's quashing of the subpoena for a clear abuse of discretion. *See Cruden v. Bank of New York*, 957 F.2d 961, 972 (2d Cir. 1992). Logan's assertion that the director would have provided information suggesting that the state was actively involved in fashioning Bennington's policy and prescribing Logan's dismissal, is mere speculation. Moreover, Logan was afforded discovery as to all of Bennington's employees and all written correspondence between Bennington and the HRC. In light of Logan's access to these documents and his failure to suggest why the deposition would produce evidence beyond that which was already memorialized in the documents, the district court did not abuse its discretion in quashing the subpoena.

With regard to the merits of the due process claim, a "state action" occurs where the challenged action of a private party is "fairly attributable" to the state. *See Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937 (1982); *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 351 (1974) (the conduct of the private party "may be fairly treated as that of the State itself."). Private party conduct is fairly attributable to the state when (1) the deprivation is "caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or by a person for whom the State is responsible," and (2) "the party charged with the deprivation [is] a person who may fairly be said to be a state actor." *Lugar*, 457 U.S. at 937. A party may be a "state actor"

because he or she "is a state official, because he [or she] has acted together with or has obtained significant aid from state officials, or because his [or her] conduct is otherwise chargeable to the State." *Id.* Characterizing a private party as a "state actor" is a fact-specific inquiry, and courts considering the issue typically look to such factors as the public function of the party's conduct, whether the private party acted under state compulsion, the nexus between the party's conduct and the state, and whether the party's conduct was jointly undertaken with the state. *See Id.* at 939.

In the instant case, Bennington reached a conciliation agreement in an unrelated harassment case with the HRC, pursuant to which it agreed, among other things, to settle a student's harassment claim against another Bennington professor, and to revise its harassment policy in order to comply with the law. Because the HRC was involved in the conciliation agreement, the district court noted that the interim policy was adopted at the Vermont HRC's "urging." The HRC, however, had no involvement in Logan's case. The question is, thus, whether Bennington functioned as a state actor solely because the HRC was part of the impetus for the adoption of Bennington's interim policy. According to Logan, any action undertaken in compliance with the interim policy is state action, because the HRC provided part of the impetus for adopting that policy.

Logan's argument stretches the meaning of state action too far. Bennington was revising its policy to comply with Vermont law, but its action in terminating Logan was in no way dictated by state law or state

actors. Our decision in *Albert v. Carovano*, 851 F.2d 561 (2d Cir. 1988) (in banc) is instructive in this matter. In *Albert*, we considered whether a private university's adoption of a disciplinary code in order to comply with state law constituted state action. The state neither drafted the disciplinary code, nor participated in determining what sentence was to be handed out under it. We held that there was no state action under these circumstances, and that state action would not be found unless "the particular sanction under challenge was imposed as a result of the acts of state officials . . . or as a result of 'a reasonable and widespread belief' by college or university administrators that the imposition of the sanction was required [by a particular state law.]" *Id.* at 570. *See also Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982) ("[O]ur precedents indicate that a State normally can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State.").

Here, there is an insufficient nexus between the HRC and Logan's termination under Bennington's interim policy to warrant a finding of state action. His termination was neither imposed by the acts of state officials acting alone or in concert with College officials, nor imposed by Bennington in the belief that it was required by law. The interim policy afforded several courses of action that the College could take once the Committee found that Logan committed the harassment, and the ultimate decision to terminate Logan was Coleman's. The district court, therefore, correctly granted Bennington's motion

for summary judgment dismissing Logan's federal due process claim.

The district court also relied on the lack of state action to grant Bennington's motion for summary judgment with respect to Logan's claim of violation of his due process rights under the Vermont Constitution. The district court assumed, without addressing the issue, that state action is required for state due process protection to be triggered. On appeal, Logan argues that state action is not required for due process protection under the Vermont Constitution, because Vermont's Constitution is based on an "ideologically different basis" than the federal constitution, namely libertarianism. In support of this contention, Logan cites to Chapter I, Articles 9 and 10 of Vermont's Constitution, which provide in relevant part that "no part of any person's property can be justly taken from him, . . . without his own consent, ... nor can any person be justly deprived of his liberty, except by the laws of the land." He then contends that because there is no express reference in these passages to state action, the Vermont Constitution must protect life, liberty, and property against deprivation without due process by any entity, not just by action of the state.

The only case Logan presents in support of his novel argument is a concurring opinion from *State of Vermont v. Kirchoff*, 587 A.2d 988 (Vt. 1991), in which, according to Logan, the concurrence stressed the libertarian underpinnings of the Vermont Constitution. *See id.* at 998 (Springer, District Judge (Ret.), concurring). Notwithstanding the merits of the *Kirchoff* concurrence's discussion, it is quite another matter—indeed, a gigan-

tic jurisprudential leap of logic—to infer that, therefore, a due process claim under the Vermont Constitution does not require state action. Other than the concurring opinion in *Kirchoff*, Logan cites no case supporting his proposition that under the Vermont Constitution private entities acting as such are bound to provide due process to private individuals in the absence of state action. The argument is unprecedented. In the absence of authority directly supporting his proposition, we hold that the district court correctly granted summary judgment on Logan's state-based due process claim.

2. Negligence.

Logan contends that the district court also erred in granting summary judgment to Bennington on his negligence claim. Logan's complaint alleges that Bennington negligently exercised its duty to investigate, prosecute, and judge him. More specifically, Logan alleges that Bennington was negligent in restricting the testimony allowed at the hearing and refusing to allow a meaningful appeal. The district court granted summary judgment on the grounds that Logan's claim was too "vague," in that he failed to specify the duty of care that was breached.

On appeal, Logan elaborates on the supposed duty of care that Bennington owed him. He contends that Bennington owed him a duty of care by virtue of extending him tenure, and that it breached this duty by modifying the sexual harassment policy without faculty approval. Bennington argues that Logan's claim is a contract claim masquerading as a tort claim. We agree.

The duty of care that Logan claims is due him is nothing more than the claim that he is entitled to receive that which is due him under the contract. *See Breslauer v. Fayston Sch. Dist.*, 659 A.2d 1129, 1132-33 (Vt. 1995) (explaining that breach of a contractual obligation does not create an independent tort); *accord Clark-Fitzpatrick, Inc. v. Long Island R.R.*, 516 N.E.2d 190, 193-94 (N.Y. 1987) ("[A] simple breach of contract is not to be considered a tort unless a legal duty independent of the contract itself has been violated.") (citations omitted). Because Logan is unable to describe a more particular duty that is independent of Bennington's obligations under the employment contract, we affirm the district court's dismissal of Logan's negligence claim.

CONCLUSION

Based on the foregoing, we affirm the district court's grant of Bennington's motion for summary judgment and dismissal of Logan's due process and negligence claims. We reverse, however, the judgment of the district court denying Bennington's motion for judgment as a matter of law, and remand this case with instructions to vacate the verdict and jury award entered against Bennington College.

APPENDIX E — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF VERMONT FILED AUGUST 26, 1994

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT

Civil No. 5:91-116

LEROY LOGAN

v.

BENNINGTON COLLEGE CORPORATION, ET AL.

ORDER

On July 15, 1994, following trial, a jury found defendant Bennington College ("Bennington") liable to plaintiff Leroy Logan ("Logan") for breach of contract. The following motions are currently pending before the Court:

1. Plaintiff's Motion for Attorneys' Fees;

2. Plaintiff's Bill of Costs; and

3. Defendant's Motion for Judgment as a Matter of Law or in the Alternative for a New Trial, or in the Alternative for Remittitur.

Factual Background

Plaintiff was employed as a professor at Bennington. Bennington dismissed Logan after a student lodged charges of sexual harassment against him. At trial, plaintiff argued that the

sexual harassment charge was baseless and that his resulting dismissal breached his employment contract, which authorized dismissal only for good cause. The defendant maintained that Bennington's interim policy on sexual harassment was incorporated into plaintiff's employment contract and thus served as valid grounds for his dismissal. The jury found that Bennington was liable to plaintiff for $500,000 in damages.

Discussion

I. Plaintiff's Motion for Attorney's Fees

Plaintiff has moved for the recovery of attorneys' fees as provided in Fed. R. Civ. P. 54(d)(2). The defendant has filed opposition to this motion and plaintiff filed a brief in reply.

Under the traditional "American Rule," attorneys' fees are not available to a prevailing party in the absence of statutory or contractual authority. *In re Gadue,* 149 Vt. 322, 327 (1987). A court may, however, award attorneys' fees in exceptional cases where the interests of justice so require. *Sprague v. Ticonic Nat'l Bank,* 307 U.S. 161, 166 (1939).

In the instant case, plaintiff alleges that attorneys' fees are appropriate based on evidence presented at trial demonstrating defendant's bad faith and reckless disregard of plaintiff's rights under the contract. In its reply brief, plaintiff further maintains that attorneys' fees should be awarded as consequential damages for violation of the contract in question. Neither of these arguments persuades the Court that justice requires a departure from the traditional rule.

Appendix E

II. Plaintiff's Bill of Costs

Plaintiff has submitted a Bill of Costs totalling $2900.75, representing his filing fee and the costs incident to the taking and copying of depositions. Defendant objects to the deposition costs, alleging that the length and number of depositions taken by the plaintiff are excessive. Defendant maintains that plaintiff spent a significant amount of time in deposition developing plaintiff's "state action" theory which was subsequently dismissed by the Court on summary judgment.

The Court determines that the depositions were necessary to the case presented by the plaintiff at trial and that their number and length were not excessive.

III. Defendant's Motion for Judgment as a Matter of Law or in the Alternative for a New Trial, or in the Alternative for Remittitur

Initially, defendant moves for Judgment as a Matter of Law, pursuant to Fed. R. Civ. P. 50(b). Defendant asserts that no evidence was presented at trial to demonstrate that defendant breached its contract with plaintiff by either: (1) failing to follow the interim policy on sexual harassment; (2) firing plaintiff without good cause; or (3) acting in bad faith.

In considering a motion under Rule 50, the Court must determine whether there was a sufficient evidentiary basis for a reasonable jury to find in favor of the prevailing party. If the evidence is insufficient, the Court may grant the motion with respect to a claim or defense that cannot be legally maintained. Fed. R. Civ. P. 50(a)(1). In assessing the sufficiency of the evidence, the Court may not weigh the evidence, determine

witness credibility or substitute its opinion of the facts for the jury's. *Weld v. Piedmont Airlines Inc.*, 985 F.2d 57, 59 (2d Cir. 1993) (quoting 9 Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2524, at 541-45 (1971). The nonmovant must be given the benefit of all reasonable inferences. *Id.* at 60. Viewing the evidence under this standard, the Court determines that sufficient proof was presented at trial to support the jury's findings.

In the alternative, the defendant has moved for a new trial, pursuant to Fed. R. Civ. P. 59. Defendant seeks a new trial on the following grounds: (1) that the verdict is clearly against the weight of the evidence; (2) that the admission of testimony by witness Roberta Tansman regarding a separate and distinct sexual harassment complaint was improper and highly prejudicial. Defendant further alleges that the Court erred in barring defendant from demonstrating the witness bias; (3) that the Court erred by improperly instructing the jury with respect to the effect of the interim sexual harassment policy on the parties' contract; and (4) that the jury's excessive verdict disregarded the Court's instructions and is unsupported by either fact or law. Plaintiff has filed opposition.

Fed. R. Civ. P. 59(a) provides that, after a jury trial, a new trial may be granted "for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States." Regarding defendant's first claim, the Court has already determined that the evidence presented at trial was sufficient to support the jury's verdict. Further, the Court is unpersuaded by defendant's second and third grounds for new trial. These issues were ruled upon by the Court during the course of trial and the Court stands upon these rulings.

Appendix E

With respect to defendant's fourth and last argument that the jury verdict is excessive, the Court concludes that this ground does not warrant a new trial. New trial is mandated where the Court concludes that the jury's verdict was so swayed by passion or prejudice that it shocks the conscience of the Court. *See Goldstein v. Manhattan Indus., Inc.*, 758 F.2d 1435, 1447 (11th Cir.), *cert. denied*, 474 U.S. 1005 (1985) (citations omitted). In the present case, the Court does not find that the jury was so swayed. Nevertheless, the jury's award of damages is subject to remittitur.

Remittitur is appropriate where the court can identify an error that led the jury to include in the verdict a quantifiable amount that should be stricken. *Shu-Tao Lin v. McDonnell Douglas Corp.*, 742 F.2d 45 (2d Cir. 1984). The Court may then enter a remittitur order reducing the jury's award to the amount established by the evidence. *Goldstein*, 758 F.2d at 1448.

At trial in the present case, the Court ruled that plaintiff's damages were limited by his five-year employment contract and that punitive damages were not recoverable. During the course of its deliberations, the jury submitted a question to the Court asking whether it could award a sum for punitive damage or personal injury. Again, the jury was instructed that damages were limited to lost earnings and benefits, past, present and future and that no punitive damages were available. Plaintiff's expert testified that, at most, plaintiff's damages were $272,712. In light of the testimony given at trial, and the Court's instructions, the jury's award of $500,000 exceeds the amount available to plaintiff in accordance with his contract. Accordingly the jury award must be limited to $272,712 and that amount must be reduced by plaintiff's substitute income of $500 per week acquired during the contract period, resulting in an

adjusted damages award of $202,794.02. Should the plaintiff reject this adjusted award, the Court must grant a new trial. *Shu-Tao Lin*, 742 F.2d at 49.

Conclusion

Based on the foregoing conclusions, the Court hereby:

1. DENIES Plaintiff's Motion for Attorneys' Fees.

2. GRANTS Plaintiff's Bill of Costs.

3. DENIES Defendant's Motions for Judgment as Matter of Law and Motion for a New Trial.

4. GRANTS Defendant's Motion for Remittitur. The judgment is hereby reduced to $202,794.02 SUBJECT TO plaintiff's acceptance. In the event that plaintiff refuses to accept this amount, a new trial on the issue of damages is ordered.

SO ORDERED.

Dated at Rutland in the District of Vermont this 25th day of August, 1994.

s/ Franklin S. Billings, Jr.
Franklin S. Billings, Jr.
District Judge

APPENDIX F — JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF VERMONT FILED JULY 15, 1994

UNITED STATES DISTRICT COURT
DISTRICT OF
Vermont

CASE NUMBER: 5:91-cv-116

Leroy Logan

v.

Bennington College Corporation, et al.

JUDGMENT IN A CIVIL CASE

☒ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☐ **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that defendant Bennington College Corporation is liable as the plaintiff has alleged in his complaint and find for Leroy Logan the sum of $500,000.00 damages.

Post Judgment interest rate: 5.31%

Appendix F

July 15, 1994

s/ RICHARD P. WASKO
Clerk

s/ C. Burbank
(By) Deputy Clerk

JUDGMENT ENTERED ON DOCKET
DATE: 7/15/94

APPENDIX G — CONSENT TO REDUCE VERDICT DATED SEPTEMBER 23, 1994

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

Civil No. 5:91-116

LEROY LOGAN

v.

BENNINGTON COLLEGE CORPORATION, ET AL

CONSENT TO REDUCE VERDICT

Leroy Logan, Plaintiff in the above entitled action, hereby consents that the verdict of $500,000.00 rendered in favor of the Plaintiff and against the Defendant, Bennington College Corporation may be reduced to the sum of $202,794.02, plus costs, in lieu of a new trial on the issue of compensatory damages, pursuant to the Court's Order dated August 25, 1994.

Dated at Middlebury this 23rd day of September, 1994.

s/ William K. Sessions, III
William K. Sessions, III, Esq.
Federal Id. No. 000 409182

for Plaintiff, Leroy Logan

cc: Ellen Fallon, Esq.
Leroy Logan

Supreme Court, U.S.
FILED
JUL 17 1996
CLERK

No. 95-2039

In The

Supreme Court of the United States

October Term, 1995

LEROY LOGAN,

Petitioner,

vs.

BENNINGTON COLLEGE CORPORATION,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF OF RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether this Court should grant certiorari in this state law contract case as a vehicle to establish rules and procedures for the review of recusal decisions by judges of the United States Courts of Appeals, where Petitioner's recusal motion was untimely, Petitioner was afforded adequate review at the circuit court level, and where action by this Court cannot provide any meaningful relief to Petitioner?[1]

---

[1] Note: Respondent does not agree that it would be appropriate for this Court to hear argument on petitioner's second question presented (challenging the Second Circuit's decision on the merits of this diversity contract case) should the Court grant certiorari on the first question. If certiorari were granted, the only appropriate relief for this Court to order would be a remand to the Second Circuit to reconsider its recusal decision under whatever rules and procedures this Court were to prescribe.

STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

Bennington College Corporation is a non-profit corporation organized under the laws of Vermont. It has no parent or subsidiary corporation and does not issue capital stock. The caption of the case as set forth by Petitioner does not list all parties in the proceeding below. The names of all parties are listed in the Second Circuit's caption to its opinion, appearing in Petitioner's Appendix at 9a. *See also Logan v. Bennington College Corp.*, 72 F.3d 1017 (2d Cir. 1995).

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BRIEF OF RESPONDENT IN OPPOSITION

Respondent Bennington College Corporation respectfully prays that this Court deny the Petition of Leroy Logan ("Petitioner") for review of the action of the United States Court of Appeals for the Second Circuit.

COUNTERSTATEMENT OF THE CASE

Respondent is a private college located in Bennington, Vermont. Petitioner Leroy Logan was an instructor of drama at Bennington College, until his termination on July 20, 1990. Petitioner's termination resulted from a sexual harassment complaint lodged against him by a Bennington College student. The complaining student testified before the College's sexual harassment committee that Petitioner Logan forced him to have sexual relations against his will on Thanksgiving Day 1989, in Cardiff, Wales, while a group of Bennington students were abroad studying in the College's "London Program". Petitioner was director of the London Program, and the teacher and counselor to the student complainant at the time of these events.

A. Statement of Facts

The Petition contains various omissions, misstatements, and errors concerning the underlying facts and history of this state law contract case. In particular, Respondent does not agree that Petitioner's analysis of the factual basis for the Second Circuit's opinion (Petition at 8-11) presents a fair review of the record. However,

these concerns are essentially irrelevant in light of the narrow reason urged by Petitioner for granting the Writ. Even if certiorari were granted to address the recusal procedure issue, this Court would not be in an appropriate procedural posture to review the merits of the Second Circuit's Opinion at this time. Contrary to Petitioner's suggestion, however, this case is not "extraordinary." It is a state law breach of contract case arising out of a faculty member's dismissal for sexual misconduct with a student. What follows is a brief outline of the underlying factual issues designed to put the case in perspective and to comply with Supreme Court Rule 15.2.

In May of 1990, a male drama student filed a sexual harassment complaint against the Petitioner Leroy Logan. The complaint was submitted to the director of student affairs and referred to the College's sexual harassment committee, pursuant to the College's written sexual harassment policy. Thereafter, the Petitioner was provided, among other things, with a copy of the student's written complaint, a notice of hearing, a list of witnesses, and a list of the members of the committee who would hear the case.

On May 31, 1990, a hearing was held before the sexual harassment committee. The members consisted of the director of student affairs, two faculty members, a student, and a staff member. All members of the committee were present at the hearing, which lasted some five hours. During the hearing the complaining student testified in detail regarding a forced sexual encounter that occurred with the Petitioner on Thanksgiving Day, 1989. Petitioner was present at the hearing along with a faculty

representative of his choice. Both Petitioner and the student complainant were allowed to question witnesses and speak at the hearing.

The committee deliberated after the hearing. Thereafter, pursuant to the College's policy, the committee delivered its written decision and recommendation to the president of the College, Elizabeth Coleman. The committee members unanimously found the student's testimony to be credible and found Petitioner's testimony to be vague and unbelievable. The committee's report determined that a forced sexual encounter had occurred, and thus that "sexual harassment", within the meaning of the College's policy, had taken place. The committee unanimously recommended to President Coleman that due to the serious nature of the charge – forced oral intercourse – Petitioner be terminated.

President Coleman accepted the findings and recommendation of the committee and informed Petitioner that he was to be terminated. Under the policy, Petitioner chose to appeal to President Coleman for reconsideration. Petitioner obtained counsel, was granted an extension of time and appeared with his attorney, Louis H. Benjamin, of the New York firm of Slotnick and Baker, to present additional evidence and arguments at a hearing before President Coleman. This hearing lasted approximately two hours.

After the hearing, President Coleman reviewed the written submissions of Petitioner and his counsel, and determined that there was no basis to reconsider the original decision to terminate Petitioner's employment.

Mr. Logan was advised of this decision, in writing, on July 20, 1990.

B. Procedural History

On April 25, 1991, Petitioner Logan filed the instant suit, alleging nine original counts against Respondent and seven individual defendants, and seeking reinstatement and money damages. After an initial hearing, the district court denied Plaintiff's Motion for a Preliminary Injunction reinstating him to his former position. Subsequently, Plaintiff stipulated to dismissal of his defamation claims, and in a series of orders the district court dismissed all of the individual defendants and four of the legal theories, including all federal questions. The sole defendant remaining in the case at the time of trial was Respondent Bennington College Corporation, and the sole counts remaining to be tried alleged various state law theories of breach of employment contract. The basis for federal court jurisdiction was diversity. At jury draw, Plaintiff withdrew his claim for permanent injunctive relief.

The jury returned a verdict of $500,000. The district court concluded that the jury had made an "error", but nonetheless denied Respondent's post trial motions for judgment as a matter of law or for a new trial. The district court did grant Respondent's Motion for Remittitur, adjusting the damage award to $202,794.02. Petitioner accepted the remitted damages award in lieu of a new trial.

Both the College and Petitioner Logan appealed to the Second Circuit. Respondent's primary argument on

appeal was that Petitioner Logan had not presented evidence sufficient as a matter of law to support his claim that the College had breached an employment contract with Petitioner. The Second Circuit agreed with Respondent and vacated the jury award. The Second Circuit's opinion clearly explains why none of Petitioner's four contract theories had been established at trial. Petitioner's Appendix at 19a-30a.[2]

In his cross-appeal, Petitioner Logan asked the Second Circuit to review the district court's dismissal on summary judgment of Petitioner's state and federal due process claims and his negligence claim. In addition, the Petitioner requested that the Second Circuit review the district court's failure to charge the jury on punitive damages. The Second Circuit rejected each of these arguments.

Oral argument took place on May 18, 1995, in New York City. Petitioner was represented in the Second Circuit, as he had been at trial, by William K. Sessions, an attorney who at that time had been nominated to fill an opening in the District of Vermont as a United States District Court judge. Subsequent to oral argument, but before the Second Circuit issued its opinion, Attorney Sessions was sworn in as United States District Judge for the District of Vermont.

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[2] Because the Second Circuit concluded that Petitioner had failed to meet his burden of proof as a matter of law, the court did not address Respondent's additional arguments for reversal. *See* Petitioner's Appendix at 30a. For this reason, among others, it would be inappropriate for this Court to entertain Petitioner's second question presented.

In light of Mr. Sessions' pending judicial appointment, there was some friendly banter during oral argument in connection with Mr. Sessions' significant trial skills. At one point during the argument, Judge Altimari indicated that he had been contacted by someone in the Justice Department concerning Mr. Sessions' judicial appointment. Judge Altimari indicated that the person should call back as he would now have something favorable to say about Mr. Sessions – that he had done a magnificent job in this case. Far from showing evidence of personal bias or prejudice *against* Petitioner on the part of Judge Altimari, the statements quoted in Mr. Logan's Petition for Certiorari must be viewed in the context of the entire oral argument.[3] Further, these statements – concerning the issue of "faculty control" at the College – must be viewed in the context of Petitioner's persistent strategy in the case to explicitly link his firing to subsequent disputes between the College's faculty and its administration.

The Second Circuit issued its opinion and order on December 14, 1996. Only after issuance of the opinion did Petitioner, through successor counsel, move to recuse Judge Altimari. The motion was prospective only, seeking to disqualify Judge Altimari from "further proceedings" in the matter. Simultaneously, Petitioner filed a Motion

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[3] The Petition for Certiorari (at p. 7) contains quotations from the oral argument drawn, Respondent believes, from an unofficial transcript prepared by Petitioner's counsel. Respondent notes for the record that this transcript does not appear to be a fully accurate verbatim transcript of the audiotape, and that Petitioner's successor counsel was not present at oral argument.

for Rehearing in the Second Circuit, with a suggestion for rehearing en banc. A central theme in the Motion for Rehearing – indeed Petitioner's first point of argument – was the issue of Judge Altimari's alleged bias. The motion to recuse Judge Altimari was also filed as an appendix to the Motion for Rehearing and Suggestion for Rehearing en banc.

The Second Circuit denied Petitioner's motion for recusal of Judge Altimari on February 23, 1996. By order dated March 11, 1996, the Court also amended its original opinion by removing reference to certain background information concerning the subsequent disputes between the faculty and the administration at Bennington College. This Order was signed by all three judges of the panel, stating that "[t]he [deleted] language contained background, and has no bearing whatsoever on the disposition of the appeal or the key issues raised on appeal concerning the sufficiency of the evidence supporting Leroy Logan's claims." The Petition for Rehearing and Suggestion for Rehearing En Banc was denied on March 19, 1996. The Order denying rehearing states specifically that the motion (which included the issue of Judge Altimari's alleged bias) had been considered "by the panel" that decided the appeal, and further noted that the suggestion for rehearing en banc had been "transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon."

ARGUMENT

Supreme Court Rule 10 provides that review on writ of certiorari is not a matter of right, but of judicial discretion. The writ will be granted only "for compelling reasons". The Petitioner has failed to set out any "compelling" reasons why this Court ought to grant the writ, other than Petitioner's dissatisfaction with the result below. Petitioner's argument concerning the recusal of Judge Altimari provides insufficient ground for review, where the Second Circuit's decisions have all been unanimous, and no judge of the circuit considered the case worthy of en banc hearing. Petitioner has not claimed the existence of a conflict among federal circuits or state courts of last resort, nor is an important question of federal law involved. Petitioner's reliance on this Court's general supervisory authority ought to be viewed with skepticism. It is an apparent tactical device to obscure Petitioner's attempt to have this Court review the merits of the Second Circuit's decision, which Petitioner concedes would not merit review. *See* Sup.Ct.R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law").

I. The Impartiality Of Judge Altimari May Not Reasonably Be Questioned.

Unless grounds for disqualification are clearly established, a judge has a duty to sit on an assigned case, and should not recuse himself or herself unless an "objective, disinterested observer fully informed of the facts underlying the grounds on which recusal was sought would

entertain a significant doubt that justice would be done." *Pepsico, Inc. v. McMillen*, 764 F.2d 458, 460 (7th Cir. 1985).

This is a high standard to meet. Grounds for recusal must not be lightly inferred nor motions to disqualify frequent, in light of the deleterious consequences this would have upon the judicial system. The facts required to justify recusal must not be "lightly imputed to a judge", nor based on speculation. *Health Services Acquisition Corp. v. Liljeberg*, 796 F.2d 796, 803 (5th Cir. 1986), *aff'd*, 486 U.S. 847 (1988); *see United States v. Greenough*, 782 F.2d 1556, 1558 (11th Cir. 1986) ("a charge of partiality must be supported by facts").

Under 28 U.S.C. § 455(a), recusal is "required only if the judge's impartiality 'might *reasonably* be questioned.' " *Liteky v. United States*, 510 U.S. 540, 114 S. Ct. 1147, 1158 (1994). In his concurring opinion in *Liteky*, Justice Kennedy described the operation of § 455(a) as follows:

> [I]t should suffice to say that § 455(a) is triggered by an attitude or state of mind so resistant to fair and dispassionate inquiry as to cause a party, the public, or a reviewing court to have reasonable grounds to question the neutral and objective character of a judge's rulings or findings. I think all would agree that a high threshold is required to satisfy this standard. Thus, under § 455(a), a judge should be disqualified only if it appears that he or she harbors an aversion, hostility or disposition of a kind that a fair-minded person could not set aside when judging the dispute.

114 S. Ct. at 1158. Petitioner presented no evidence to the Second Circuit of personal interest, bias, or prejudice on

the part of Judge Altimari, nor any basis for reasonably questioning his impartiality.

Petitioner argues that Judge Altimari's remarks at oral argument concerning "faculty control" at the College, and a paragraph of background information in the Second Circuit's original opinion about the College's highly publicized downsizing, were surprising, or out of place, and therefore evidence of bias on the part of Judge Altimari. But "[d]isinterestedness does not mean child-like innocence," *Liteky*, 114 S. Ct. at 1155 (quoting *In re J.P. Linahan, Inc.*, 138 F.2d 650, 654 (2d Cir. 1943)), and "[t]he acquired skill and capacity to disregard extraneous matters is one of the requisites of judicial office." *Liteky*, 114 S. Ct. at 1161 (Kennedy, J., concurring). Petitioner's contention was appropriately rejected by the Second Circuit and flies in the face of reality for a number of reasons.

First, Petitioner's previous counsel's trial strategy was to put directly in issue both "faculty control" and the restructuring of the College. At trial, Petitioner's counsel was aggressive in his pursuit of the theme that the College administration was engaged in a general abuse of power over faculty and that Petitioner's termination was related to the subsequent termination of a significant number of faculty members in the College's restructuring. Petitioner introduced evidence that the faculty members who had "supported" him had lost their jobs in the restructuring, and Petitioner's counsel argued at trial and on appeal that the terminations resulting from the College's restructuring and Petitioner's firing were motivated by the "same administrative arrogance". *See* Brief for Appellee/Cross-Appellant Logan at 45; Tr. IV, pp. 49-50.

In addition, Petitioner's counsel vigorously pursued at trial the position that Bennington College was, at the time of Petitioner's termination, a "faculty run organization." *See, e.g.*, Tr. I, p. 24. Petitioner's counsel pressed the same point at oral argument in the Second Circuit: "Bennington College has been traditionally a place in which faculty has had tremendous impact upon . . . . " This statement prompted Judge Altimari to "call" counsel on his hyperbole, by saying, "and get very upset and uptight when something is done without their imprimatur. And the President doesn't mean anything, the Dean doesn't mean anything – no one means anything in that institution, other than the members of the faculty who control everything that goes on." In fact Judge Altimari was merely restating the position that had been taken by Petitioner's faculty witnesses at trial and by Petitioner's counsel at trial and on appeal.

Second, the comments of Judge Altimari quoted in the Petition must be considered in the context of the entire oral argument. The tone of the argument can best be characterized as "light," and many of the comments made by the court were favorable to Petititioner or his counsel. As a whole, the atmosphere at oral argument was directly contrary to its characterization by the Petitioner. An objective disinterested observer, fully informed of the facts, would have no significant doubt that justice could be done. *See Pepsico*, 764 F.2d at 460.

Finally, in light of Petitioner's persistent strategy, it is not surprising that the original Second Circuit opinion made reference to the College's "downsizing" and noted that many "professors . . . contend that they were fired simply because they sided with Logan in the instant

dispute." These comments simply track Petitioner's evidence at trial and his theme in this case. *See, e.g.*, Brief for Appellee/Cross-Appellant Logan at 45. Further, a judge is not a juror, and the reference in the opinion to two articles about the College in high-profile news publications does not implicate the standard set out by 28 U.S.C. § 455. As Petitioner concedes, the articles cited in the opinion represent opposing sides of the clash, and the court does not take sides. The Second Circuit later amended its opinion to remove these references, with all three judges of the panel concluding that the information was "background" only, and had "no bearing whatsoever on the disposition or the key issues raised on appeal concerning the sufficiency of the evidence supporting [Petitioner's] claims." Petitioner's speculation concerning Judge Altimari's views does not provide grounds for recusal, nor for review by this Court.

Moreover, even if recusal were appropriate, review by this Court is unwarranted, as there exists no basis to reverse the Second Circuit's disposition of the case. Decisions to vacate lower court rulings based upon recusal have been issued in only the most stringent circumstances. One court noted that "[o]ur research has not turned up any case involving mere appearance of impropriety in which the court set aside decisions that had been taken by the district judge before any party asked for recusal." *United States v. Murphy*, 768 F.2d 1518, 1539 (7th Cir. 1985), *cert. denied*, 475 U. S. 1012 (1986). Even where a judge should have recused himself, courts are reluctant to vacate a prior decision. *See In re Continental Airlines Corp.*, 901 F.2d 1259, 1263, *reh'g denied*, 918 F.2d 177 (5th Cir. 1990).

This Court has indicated that the decision to vacate a lower court opinion may turn on whether the vote of a judge in question was a swing vote and has recognized that courts have held that "a decision need not be vacated where a disqualified judge's vote is mere surplusage." *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 827 (1985). *See also Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 862 (1988) ("There need not be a draconian remedy for every violation of § 455(a)"). In the present case all of the Second Circuit's rulings have been unanimous. Judge Altimari's vote was not a swing vote; therefore, his participation cannot have deprived petitioner of any substantial right. There is thus no risk of injustice to the parties in this case, or in other cases, *see Liljeberg*, 486 U.S. at 864, nor is there any risk – given the procedures followed here, including en banc review – of undermining the public's confidence in the judicial process, *id.*

For these reasons no compelling or important reason for review of the Second Circuit's unanimous decision has been shown.

II. Petitioner's Motion To Recuse Was Untimely In The Second Circuit; Thus, Review In This Court Would Be Inappropriate.

Although Petitioner's motion in the Second Circuit for recusal was framed prospectively, it was in essence an argument that Judge Altimari should have recused himself from determination of the appeal in the first instance. The grounds for Petitioner's motion were the comments of Judge Altimari at oral argument, and in his motion to the Second Circuit, Petitioner argued that Judge

Altimari's bias was shown at the time of argument. Yet Petitioner never filed a request to disqualify Judge Altimari following that argument and before the Second Circuit's decision, issued almost seven months later. Rather, Petitioner waited until an unfavorable decision was handed down before raising the issue of disqualification. Certainly, the mere fact that the Second Circuit has ruled against Petitioner, in a decision issued unanimously by a panel of three appellate judges, cannot in itself provide grounds for disqualification.[4]

It is well established in the Second Circuit, and elsewhere, that a motion for the disqualification of a judge must be made in a timely manner. *In re International Business Machines Corporation*, 618 F.2d 923, 932 (2d Cir. 1980); *see also, e.g., E & J Gallo Winery v. Gallo Cattle Co.*, 967 F.2d 1280 (9th Cir. 1992); *United States v. York*, 888 F.2d 1050, 1055 (5th Cir. 1989); *Union Carbide Corp. v. U.S. Cutting Service, Inc.*, 782 F.2d 710, 716 (7th Cir. 1986). Timeliness requires the party making the recusal motion to do so "at a reasonable time in the litigation," and not delay for strategic purposes. *York*, 888 F.2d at 1055.

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[4] Petitioner attempts to argue in this Court that it was only upon noting the inclusion of certain background material in the written opinion of the Second Circuit that the grounds for disqualification became clear. Yet the crux of Petitioner's argument for recusal is based upon Judge Altimari's oral remarks, and, as discussed above, the background section in the opinion merely reflected Petitioner's own theory of the case. Moreover, all three judges of the Second Circuit panel concluded that the background materials had "no bearing whatsoever on the disposition of the appeal". Petitioner's Appendix at 4a.

The Ninth Circuit recently considered a timeliness issue directly analogous to the one at hand. The defendant in *Gallo*, 967 F.2d at 1280, moved for a new trial after judgment was entered against him in a bench trial, arguing that the judge should have disqualified himself in the proceeding. The court ruled the motion untimely:

> [I]t does not necessarily follow that a party having information that raises a possible ground for disqualification can wait until after an unfavorable judgment before bringing the information to the court's attention. It is well established in this Circuit that a recusal motion must be made in a timely fashion . . . . "The absence of such a requirement would result in . . . a heightened risk that litigants would use recusal motions for strategic purposes."

Gallo, 967 F.2d at 1295 (citations omitted) (quoting *Preston v. United States*, 923 F.2d 731, 733 (9th Cir. 1991)). The court held that a litigant should not be allowed to "withhold recusal motions, pending a resolution of their dispute on the merits, and then if necessary invoke Section 455 in order to get a second bite at the apple." 967 F.2d at 1295. Similarly, in *Schurz Communications, Inc. v. F.C.C.*, 982 F.2d 1057 (7th Cir. 1992), the court held that a motion to disqualify the judge filed two weeks after issuance of the decision was too late, noting that "[l]itigants cannot take the heads-I-win-tails-you-lose position of waiting to see whether they win and if they lose moving to disqualify a judge who voted against them." *Schurz*, 967 F.2d at 1060. Because Petitioner knew of the alleged grounds for disqualification at the time of oral argument, yet waited

until after the decision was rendered against him, Petitioner's recusal motion was untimely, and review by this Court would not be appropriate.

Moreover, the recusal motion put forth by Petitioner in the Second Circuit sought relief only *prospectively*. As framed by Petitioner, the issue of recusal was relevant only on Petitioner's Motion for Rehearing, which was unanimously denied by the panel of three judges, and which no judge considered worthy of en banc consideration. Even if Judge Altimari should have been recused at that point, a unanimous decision on the merits had already been issued, and the two other judges on the panel also voted against rehearing. As such, this Court can offer no meaningful relief to Petitioner. *See Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 827 (1985) (noting that courts have found that "a decision need not be vacated where a disqualified judge's vote is mere surplusage").

III. The Writ Of Certiorari Is An Inappropriate Vehicle To Address Petitioner's Concern Regarding An Alleged Lack Of Procedural Rules With Regard To The Disqualification Of Circuit Court Judges.

Although Petitioner attempts to clothe his argument with the rubric of due process, the concerns presented are more academic than actual and do not warrant review in this case. Even if a lack of set standards or procedural rules regarding the recusal of appellate judges were a real or perceived problem, a grant of certiorari in any particular case – and in particular this case – would not be an appropriate mechanism to address the issue.

If, as Petitioner states, there is a complete lack of rules and procedures in connection with the disqualification of circuit judges, the matter should then be referred to an appropriate committee through the Judicial Conference, or other body. After appropriate study, if a need were found, this Court could promulgate rules of general applicability pursuant to the Rules Enabling Act or other authority. *See* 28 U.S.C. § 2071 *et seq.* Neither party in this matter has the interest, expertise, or breadth of experience necessary to assist the Court in determining the types of procedures and guidelines that are or should be followed in all of the federal courts of appeals.

Further, this Court should not use its supervisory authority over the lower federal courts to engage in such a task in this case. This Court's general supervisory authority is limited to "extraordinary" cases where a lower court has "so far departed from the accepted and usual course of judicial proceedings in a matter affecting not only the correctness of its decision but the public interest in the process by which justice is administered . . . as to call for an extraordinary exercise of [the Supreme C]ourt's power of supervision." P. Bator, et al., *Hart and Wechsler's The Federal Courts and the Federal System* 1628 (2d ed. 1973); *see also* Sup. Ct. R. 10(a). Here, the Second Circuit's handling of this state law matter was well within the norms of ordinary appellate judicial consideration. The court's unanimous decision is both thorough and well-reasoned, with ample grounding in the record and in established law. No active judge on the Second Circuit felt the case worthy of en banc consideration. While Petitioner does not like the result, there is nothing "extraordinary" about an appellate court finding

that a party has not met its burden of proof as a matter of law.

There is also no record in this case concerning the usual practices and procedures followed for disqualification of appellate judges as a matter of course in the Second Circuit, or in other circuits. The Petitioner merely states "it is entirely unclear what procedure is to be followed when such a motion is made." Petition at 15. Despite Petitioner's asserted lack of clarity, in this case Petitioner raised and briefed the recusal issue as the central point in his motion for rehearing, which was denied unanimously by the three judge panel and submitted to all active judges for en banc consideration. Thus, the actual procedure followed in this particular case was more than sufficient to protect "the appearance and the reality of a dispassionate judiciary". *See* Petition at 18. There has been no departure from "the accepted and usual course of judicial proceedings," *see* Sup. Ct. R. 10(a), warranting an exercise of this Court's supervisory power.[5]

Finally, a grant of certiorari in this case cannot provide any meaningful relief for Petitioner. If the issue is a lack of procedure – and Petitioner concedes this is the only viable reason to grant the Writ – then relief in this

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[5] Discussing the Court's "extraordinary" power of supervision, commentators note that the power should be exercised only to correct "egregious error", and a writ of certiorari should not be granted solely to ensure correct results as to individual litigants. Estreicher & Sexton, *A Managerial Theory of the Supreme Court's Responsibilities: An Empirical Study*, 59 N.Y.U. L. Rev. 681, 733 (1984).

Court would be limited to the Court's setting forth a procedure and remanding the matter to the Second Circuit to carry out the procedure. Following such a procedure, either Judge Altimari would be recused, or not. Even if he were recused, it is already known that the two other judges on the panel have voted against rehearing the case, and that no other judge on the Second Circuit has asked for a rehearing en banc. Accordingly, there will be no relief for Petitioner.

IV. Petitioner Was Afforded Due Process of Law.

To assure that a litigant's right to "a neutral and detached judge," *see Ward v. Village of Monroeville*, 409 U.S. 57, 62 (1972), is not abridged, codes of judicial conduct are in place, and statutory provisions require that judges act without bias or prejudice. Such provisions are generally considered self-executing. *United States v. Balistrieri*, 779 F.2d 1191, 1202 (7th Cir. 1985). Nevertheless, litigants are afforded the procedural mechanism of moving to disqualify a judge in a case where grounds for disqualification are alleged.

The few courts that have addressed recusal procedure at the appellate level recognize that a motion to disqualify an appellate judge under § 455 is properly first considered by the judge at whom the motion is directed. *See In re Bernard*, 31 F.3d 842, 843 (9th Cir. 1994); *Schurz*, 982 F.2d at 1059; *Balistrieri*, 799 F.2d at 1202-03. A motion for rehearing, en banc consideration, application for an extraordinary writ, and certiorari in this Court provide various avenues of review. *See* Stempel, *Rehnquist, Recusal, and Reform*, 53 Brooklyn L.Rev. 589, 639 (1987); D.

Knibb, *Federal Court of Appeals Manual* § 5.2, at 28-29 (West 2d ed. 1990). These procedures are adequate and appropriate in light of the special considerations that operate in a multi-member appellate court. *See 3 ABA Standards of Judicial Administration: Standards Relating to Appellate Courts*, § 3.42, at 80-81 (1994).

The ABA Standards recognize that there are a number of factors calling for different recusal procedures at the appellate court level, as compared to district court,[6] and less need for a more formalized system of review. An appellate judge is "subject to collegial restraint" and informal review by his peers; an appellate judge's personal views and views on the law can be difficult to differentiate, and to a certain extent should not be differentiated, as an appellate court's role is to contribute to the development of law; an appellate judge is faced primarily with questions of law rather than fact and has limited discretion in reviewing the issues on appeal; and lastly, there is significantly less interaction between the various players once the case has reached the appellate courtroom, which reduces the risk of bias and partiality to any particular party, thereby reducing any risk of injustice. As such, the American Bar Association standards conclude that "it is better that the question of recusal be decided by the challenged judge". *Id.* § 3.42, at 81; *see also* D. Knibb, *supra* § 5.2 at 30 (noting high

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[6] The denial of a recusal motion in the district court may be reviewed by way of direct appeal to the Circuit Court of Appeals, but such review is for abuse of discretion only. *United States v. Greenough*, 782 F.2d 1556, 1558 (11th Cir. 1986).

qualifications and experience of the judges of the United States Courts of Appeals).

In this case, the initial decision on the recusal motion was issued by "the court," thus ensuring that it was not only the judge whose impartiality was being questioned that issued the ruling. *See* Petitioner's Appendix 8a. Petitioner complains that he does not know who actually decided the recusal motion, and suggests that it was in fact decided only by Judge Altimari. Petition at 17. Such speculation should not provide grounds for review, since a decision issued by "the court" must be presumed tc have been issued by the entire panel. Even if Judge Altimari made the initial determination alone, however, his role within the multi-member court would subject him to "collegial restraint" and informal review by his peers, and issuance of the decision by "the court" gives it the court's imprimatur and approval.

In addition, Petitioner made the recusal issue a centerpiece of his motion for rehearing and suggestion for rehearing en banc. The recusal issue was briefed in the motion for rehearing, and a copy of the recusal motion itself was submitted as an appendix to the motion for rehearing and suggestion for rehearing en banc. The motion for rehearing was considered and denied, unanimously, by the three judge panel, and no Second Circuit judge felt the case worthy of en banc review. *See* Stempel, *supra*, 53 Brooklyn L.Rev. at 639 (noting role of en banc review of circuit court judge's denial of recusal motion). Accordingly, it cannot be said that there has been no effective review of the recusal decision, and Petitioner received such process as was due.

CONCLUSION

The Petition for Certiorari should be denied in all respects.

Respectfully submitted,

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Supreme Court, U.S.
FILED
SEP 27 1996
CLERK

No. 95-2039

In The

Supreme Court of the United States

October Term, 1995

LEROY LOGAN,

Petitioner,

vs.

BENNINGTON COLLEGE CORPORATION,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY BRIEF FOR PETITIONER

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I. IF THE ABSENCE OF ESTABLISHED PROCEDURES AND INDEPENDENT REVIEW FOR A RECUSAL REQUEST AMOUNT TO A DENIAL OF DUE PROCESS, THEN ANY OTHER ACTION TAKEN BY THE SECOND CIRCUIT DOES NOT REMEDY THE DENIAL OF DUE PROCESS.

Petitioner has requested that the Court grant this Writ of Certiorari to determine whether due process requires that a motion to recuse a judge of a United States Court of Appeals based upon an allegation of bias be decided or reviewed based on established procedures and by a judge other than the judge who is the subject of the motion.

Petitioner makes this request because after he alleged that the impartiality of Judge Altimari could be reasonably questioned, nothing in the record indicates that anyone other than Judge Altimari himself ruled upon the motion for recusal. At present, the law leaves petitioner, and similarly situated litigants, in a situation in which there is no established means by which to seek review of the question whether a court of appeals judge harbors improper bias, and no legal right to expect that any particular procedure, or any established procedure at all, will be followed by a court of appeals or court of appeals judge in resolving such a question.

Respondent replies to petitioner's due process concerns by pointing out that the Second Circuit opinion in this matter was unanimous, and in addition, that no Second Circuit justice voted for an en banc review of the case. Therefore, according to respondent, any bias on Judge Altimari's part is of no consequence.

Petitioner's writ should be granted, however, to establish procedures for the treatment of recusal motions and guarantee

independent review of a judge's initial recusal decision. Absent such procedures public confidence in the judicial process is undermined.

If Petitioner's challenge suggests Judge Altimari harbors a bias, then the Judge should not have participated in any way in the decision making process in this case. The fact that two other judges voted with Judge Altimari does not cure the due process violation. No one can measure Judge Altimari's impact on the outcome. Judge Altimari was the most active judge at the oral argument. He wrote the Second Circuit's opinion in this case. It appears that he actively participated in deliberations with the other judges regarding the disposition of this matter. Judge Altimari's participation and vote were not "mere surplusage." *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 827 (1985).

The fact that no other judge voted for en banc review is an equally unpersuasive argument. Nothing in the record suggests that any other Circuit Judge considered it appropriate to determine whether Judge Altimari should be recused. In fact, as pointed out in petitioner's brief, appellate court judges have declined to consider petitions to disqualify other appellate court judges. *See, e.g., Schurz Communications, Inc. v. FCC*, 982 F.2d 1057, 1059 (7th Cir. 1992) (Posner, J.). Therefore, it cannot be assumed that any independent review of Judge Altimari's refusal to recuse himself has taken place.

II. UNDER THE FACTS OF THIS CASE, THE RECUSAL REQUEST WAS TIMELY.

Petitioner acknowledges that a motion for disqualification of a judge must be made in a timely fashion. Under the circumstances of this case, however, the recusal request was timely. The request was made promptly after reading the opinion by Judge Altimari which informed petitioner of the nature and extent of his bias against petitioner.

The first obligation for recusal rests with the judge himself: "It is true that under § 455 a judge may have an obligation to recuse himself or herself without a motion from one of the parties; it is 'self-enforcing on the part of the judge.' " *E & J Gallo Winery v. Gallo Cattle Co.*, 967 F.2d 1280, 1295 (9th Cir. 1992) (quoting *United States v. Sibla*, 624 F.2d 864, 867-68 (9th Cir. 1980)). When left to the litigants to raise the issue, "there is no *per se* rule that recusal motions be made at a fixed point in order to be timely. *Id.; see Preston v. United States*, 923 F.2d 731, 733 (section 455 motion timely even though made 18 months after assignment to district judge and shortly after an adverse discovery ruling). Petitioner agrees with Respondent "that timeliness requires the party making the recusal motion to do so 'at a reasonable time in the litigation,' and not delay for strategic purposes." Respondent's Brief at 14 (quoting *United States v. York*, 888 F.2d 1050, 1055 (5th Cir. 1989)). Petitioner met this standard.

Respondent's own arguments belie any assertion that petitioner's request was untimely. Respondent maintains that nothing in Judge Altimari's comments at oral argument would lead an objective disinterested observer, fully informed of the facts, to have significant doubt that justice could be done. At the same time, respondent maintains that petitioner's recusal request was untimely because petitioner did not make his request immediately after oral argument. The only way to reconcile these two positions is to acknowledge the validity of petitioner's position: The recusal motion was timely because it is only upon noting the inclusion of certain irrelevant material in the written opinion of Judge Altimari that the prejudicial impact of his comments at oral argument became clear.

CONCLUSION

As this Court should establish guidelines regarding motions made pursuant to 28 U.S.C. § 455 for the recusal of an appellate court judge and to guarantee independent review of a federal appellate court judge's refusal to recuse himself after an allegation of bias, this petition for certiorari should be granted.

Respectfully submitted,

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September 25, 1996